Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of The United States

DANIEL DEFABIO and
PATRICIA DEFABIO,

Petitioners,

MICHAEL RUSINSKY,

Plaintiff,

vs.

EAST HAMPTON UNION FREE
SCHOOL DISTRICT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the East Hampton Union Free School District violated plaintiff's freedom of speech when it prohibited plaintiff from refuting a false rumor about him that had been spread at the school?

2) Whether the East Hampton Union Free School District's restrictions on plaintiff's ability to refute the false rumor against him were overly broad, where the District prevented plaintiff's very presence in the school and suspended him for the remainder of the school year?

3) Whether the Second Circuit, in upholding the grant of summary judgment in defendant's favor, impermissibly extended the Supreme Court's holding in *Tinker* to prohibit a student's *attendance* in school because the student's "mere presence" was thought to provoke a substantial disruption?

LIST OF PARTIES

1) DANIEL DEFABIO, Plaintiff and Petitioner;

2) PATRICIA DEFABIO, Plaintiff and Petitioner;

3) MICHAEL RUSINSKY, Plaintiff;

4) EAST HAMPTON UNION FREE SCHOOL DISTRICT, Defendant and Respondent;

5) SCOTT FARINA, individually and in his official capacity as Principal of East Hampton High School, Defendant;

6) RAYMOND GUALTIERI, individually and in his official capacity as Superintendent of Schools of East Hampton Union Free School District, Defendant;

7) WENDY HALL, individually and in her official capacity as member of the Board of Education of the East Hampton Union Free School District, Defendant;

8) STEPHEN TALMAGE, individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

9) LAURA ANKER GROSSMAN, individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

10)SHARON BACON, individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

11)THERESA K. QUIGLEY, J.D., individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

12)JOHN RYAN Sr., individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

13)MICHAEL TRACEY, individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant.

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The opinion of the Second Circuit wherein the Court affirmed the lower court's dismissal of plaintiff's constitutional claims is reported at Defabio v. East Hampton Union Free School District et. al., 623 F.3d 71 (2d Cir. 2010) and is reprinted in the Appendix hereto, p.63a-82a.

JURISDICTION

This appeal stems from an action brought pursuant to 42 U.S.C. § 1983 (2009), against defendants, the East Hampton Union Free School District and other school officials, alleging violation of plaintiff Daniel Defabio's constitutional rights under the First and Fourteenth Amendments to the United States Constitution, including freedom of speech, freedom of association, due process and equal protection. *See*, U.S. Const. amend. I and XIV. The claims relate to events at the East Hampton High School on April 26, 2004, when the defendants reacted to a racially derogatory comment, falsely attributed to Daniel, by removing him from school in violation of his constitutionally protected rights.

The underlying complaint was initiated in the United States District Court for the Eastern District

of New York on April 25, 2006. On September 30, 2009, the Honorable Joseph F. Bianco issued a final decision granting defendants summary judgment motion on the §1983 and constitutional claims.

On October 13, 2010, the Second Circuit issued an opinion affirming the district court's grant of summary judgment in defendant's favor.

This Court has subject matter jurisdiction over the appeal pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, First Section

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions

On Monday, April 26, 2004, at 1:30 p.m., when Daniel DeFabio was a fifteen year old student at East Hampton High School, he was grabbed by an administrator from his seat in the cafeteria, led to a waiting area adjacent to the principal's office, asked his mother's phone number and then escorted out of the building by an East Hampton Police officer who brought him home, never to return. While Daniel was left to guess why he was being treated like a criminal, he assumed, correctly, it had something to do with a racially offensive comment being falsely attributed to him concerning the death of a Hispanic student who died over the weekend in a motorcycle accident.

Daniel first learned that the student killed was his acquaintance "Andres," when he arrived at school on the morning of April 26th. The school announcements included an invitation to a meeting in the auditorium for anyone who was distressed. On his way to his third period science class, Daniel was walking in the hallway when he overheard a male voice state "one down, 40,000 to go." He did not see who made the comment but he believed it was referring to Andres, the student who had died. When Daniel arrived at his science class, he whispered to D.A. what he had heard in the hallway. In response, D.A. pushed Daniel and said "how could you say something like that?" Daniel immediately responded "I didn't say that, I heard that in the hallway." D.A subsequently admitted and then recanted that he

may have been mistaken about what Daniel actually said.

While Daniel made his way to his seat, he observed D.A engaged in whispering something to student N.C., starting what would become a game of "telephone" fraught with consequences for Daniel. N.C. then gave Daniel a dirty look to which he responded "that didn't come from me." While Daniel was going to his next four classes, D.A. was busy telling his friends that Daniel had made the offensive comment.

Daniel was eating lunch when four or five Latino students approached his table. They yelled at him, mentioned a "racist comment" and someone threw something at him. Shortly thereafter, the school psychologist, Naglieri and a paraprofessional, Bill Herzog, came in and took Daniel out of the cafeteria.

At the cafeteria, Daniel was identified as the young man that made the comment. Daniel was brought to the nurse's office where Naglieri asked him what was going on. Naglieri told Daniel that he was accused of making a racial comment, which Daniel emphatically denied.

D.A. was asked by Naglieri if Daniel had made the statement and D.A initially told Naglieri that he was mistaken, that Daniel did not make the statement, but then later said that he did.

The school principal, Dr. Farina, called Daniel's mother, Patricia Defabio, and told her that Danny was accused of making a comment that upset the school and that he was sending Danny home

immediately with the assistant principal and the police. Dr. Farina told her that Danny was accused of saying "one down, 40,000 to go". Dr. Farina testified that he told Mrs. Defabio that "groups of students were under the impression that Daniel had made a derogatory remark against Hispanic students, or about Hispanic students, and that it had created an unsafe environment in the high school."

After arranging for Daniel's removal, Mr. Burns and Dr. Farina returned to the auditorium meeting with the students where the students questioned "why did he [Daniel] say these things, why did he evoke that."

Daniel and his family felt it was in Daniel's best interest to come back to the high school to finish his education, but he was not permitted back into school because of "fear of his safety." Because of the actions of the District to "protect" Daniel, he was falsely tagged a bigot.

School officials believed that Daniel's presence in the school would be inflammatory. The decision to discipline Daniel only occurred when he was unwilling to comply with the school directive to stay home and remain silent.

At all times after the incident, Dr. Farina did not want Daniel to return to school. He testified about his concern that "[t]o have groups of students start to discuss a situation where an ethnic statement was made in a large hallway would create tension between different groups of students."

Daniel's mother was told by Dr. Farina that Daniel could not return to school. On the evening of April 26, 2004, Principal Farina called Mrs. DeFabio. Mrs. DeFabio "wanted to know when we could come and address the rumor and when Danny could speak for himself and tell his side of the story." In response, Dr. Farina stated that it was not safe for Daniel to return to school and he wanted him to stay home until the situation calmed. Daniel wanted to communicate with the kids at school about the incident and on the evening of April 26th, he wrote a letter.

Early in the morning of April 27, 2006, the day after Daniel was removed from school, he faxed his letter to Dr. Farina. Daniel explained he wanted to communicate this message to the school community. It read as follows:

> To all the people who thought I have made a horrible comment, I hope you will listen to me now. Yesterday I heard a very unfortunate comment in the hall way. In disbelief I repeated it to a friend adding I can't believe someone could say something that terrible. Unfortunately, the person I told chose not to here the second part of my comment. He then repeated it to one person saying that I made this comment which I did not.
>
> When I moved here two years ago and came into the East Hampton school district I was considered different "the up island urban kid". The first people to befriend me were in similar positions; the

> kids coming from different countries because they too were considered different. Although over the past two years I have settled into my own interests and made many different friends I appreciate the first friendships I had in East Hampton high school.
>
> Please understand that I am upset about the loss of a classmate also. I [k]new Andres and I liked him. So I also share the sadness and grief of my classmates. I hope our thoughts and prayers can be with Andres's family and not on hate for a comment that was taken completely out of context.
>
> Again, let me say how sorry I am about the loss of Andres and the misunderstanding about a comment I would never say.
>
> Sincerely, Daniel DeFabio

Daniel asked if the letter could be distributed to the students. Dr. Farina called Mrs. DeFabio and told her "it was a very nice letter, but in order to keep the school calm he did not want to read it and that he thought that Danny just being absent from the school was better for the school and that could inflame the situation." Dr. Farina told Mrs. DeFabio that he would copy the letter and post it in the faculty lounge. He did not want copies of the letter to get into students' hands.

At an April 29th meeting, Patricia DeFabio and Daniel's stepfather, Michael Rusinsky, were informed that Daniel was being placed at home and

tutored for the remaining six weeks of school. The DeFabios' requests to have Daniel returned to school were rejected. A disciplinary suspension was never mentioned at the meeting. Daniel was being kept home "for his own safety".

In an effort to explain the police response to the high school, Dr. Farina told a journalist for the East Hampton Star "there was a comment said in a classroom, and it upset several of Andres's friends and students." Philip Pratt, an assistant principal, told the same journalist that the student who made the inappropriate comment was escorted from the building by a police officer "for his own safety." These comments confirmed to the student's that Daniel had actually made the racist comment.

District officials did not want Daniel to return to school to "tell his side of the story" and disseminate the content of his letter because they feared Daniel's presence in school would reignite racial tensions.

Given the impasse, Patricia DeFabio and Michael Rusinsky contacted an attorney who spoke to the Assistant Superintendent of schools on the morning of April 30, 2004. That afternoon, Patricia DeFabio and Michael Rusinsky received a hand delivered letter from Dr. Farina informing them that Daniel would be suspended for *five* days. On May 3, 2004, Patricia DeFabio received a second letter informing them that a Superintendent's hearing would be held on May 7, 2004, to determine whether Daniel would be suspended beyond the initial five days.

A Superintendent's hearing was held on May 7, 2004 and four witnesses testified. Daniel consistently maintained that he had overheard the comment in the hallway and merely repeated it quietly to D.A.. The Superintendent upheld Daniel's suspension for the remainder of the 2003-2004 school year and the plaintiff appealed.

Following the Superintendent's meeting, Principal Farina accompanied Daniel to a meeting with twelve student representatives of the Latin American community in the high school. Daniel tried to explain that he never made the offensive comment, but merely repeated it with the preface, "you would not believe the terrible thing that I just heard someone say in the hallway." Daniel also distributed his written statement to the students. Most of the students told Daniel they did not believe him because he failed to return to school. They found his absence and silence consistent with guilt, even though Farina informed them that he had kept Daniel out of school and denied his request to distribute the statement.

The Commissioner of Education upheld Daniel's appeal and issued a Decision dated August 7, 2006. The Commissioner determined that Daniel consistently maintained his version of the events, both at the hearing and to the principal. In contrast, D.A.'s "testimony and demeanor were not straightforward." Daniel also testified that when administrators questioned D.A., he heard him admit that he might have misheard or misunderstood Daniel. N.C. admitted that she never heard Daniel make the comment. Finally, Dr. Farina admitted that "his investigation did not include any

subsequent interviews with Daniel after the day of the incident and there were no written reports of any investigation to substantiate the charges." The Commissioner found it "notable" that the superintendent failed to discuss any facts or testimony of the witnesses and his decision did not demonstrate that he addressed or weighed their credibility or demeanor."

The Commissioner annulled Daniel's suspension and expunged it from his record, stating: "I am constrained to determine that the record does not contain sufficient and competent evidence that [Daniel] generated the offensive comment and thus engaged in the objectionable conduct as charged."

Because of the negative feeling toward Daniel in the school and the community, his family decided to move to California. Daniel and his family have suffered emotional and economic trauma as a result of this incident.

REASONS WHY CERTIORI SHOULD BE GRANTED

I.
Review Is Warranted Because The Second Circuit Opinion Impermissibly Expanded This Court's Holding In *Tinker*

The Second Circuit held that where the "mere presence" of a student in school would be disruptive, the school can prohibit the student's attendance, even where the student's conduct is nothing more than attending the school. The court's opinion

impermissible expands the holding of *Tinker* and its progeny beyond constitutional bounds.

The case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) has provided the standard framework for evaluating the constitutionality of most-viewpoint based censorship of student speech. However, the Second Circuit in this case used the *Tinker* analysis to uphold the School District's prohibition of plaintiff's right *to attend school*. Neither *Tinker* not any of its progeny support such a radical departure from established Supreme Court precedent.

The Second Circuit decision held that "it was objectively reasonable for [the Individual Defendants] to believe that they [were] acting within constitutional and statutory bounds [citation omitted] in prohibiting Daniel's return to East Hampton High School in light of repeated and serious threats to Daniel's physical safety." Defabio v. East Hampton Union Free School District, 623 F.3d 71, 77 (2d Cir. 2010). The court went on to state:

> There is no question that *Daniel's mere presence in the school, with or without his speech*, would likely result in violence or the threat of violence and would therefore "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
> ...

Id. at 79. (Emphasis added).

Tinker and its progeny set forth the framework to circumscribe a student's First

Amendment right to *speech* in a school, not his *attendance* at the school. The Court of Appeal's extension of *Tinker* to the facts of this case impermissible deprived the plaintiff not only of his First Amendment rights to discuss the erroneous rumors that were spread against him, but also his right to a free and public education.

The decision of the school officials in prohibiting Daniel not only from speaking about the rumored comment, but speaking at all was clearly overbroad and violated Daniel's constitutional rights. *See,* Sypneiwski v. Warren Hills Regional Bd. Of Educ., 307 F.3d 243 *cert. denied* 538 U.S. 1033 (2003). A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad, that is, if it reaches too much expression that is protected by the Constitution. Id. The School's prohibition of not only Daniel's proposed speech, but also his mere presence at the school by suspending him for the remainder of the year, was clearly overbroad.

To put this case in perspective, the Second Circuit's decision, if rendered in 1957, would have opposed one of the seminal moments of the Civil Rights movement. In response to the Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954), nine African-American students entered the front lines of desegregation in public schools when they enrolled in the all white Little Rock Central High School in Little Rock, Arkansas. These students would become known as the "Little Rock Nine". In response to their enrollment, Arkansas Governor Orval Faubus called out the National Guard to prevent the students from

entering the school. The school was assailed by mobs of protestors threatening to lynch the students. President Eisenhower reacted by federalizing the entire Arkansas National Guard and sending the 101st Airborne Division of the United States Army to protect the Arkansas Nine and escort them to school. Even after the Nine were admitted to the high school, they were subjected to death threats as well as verbal and physical abuse. To say that their attendance at the school was "disruptive" is an understatement. Yet, if the Second Circuit's reasoning in this case was applied to the circumstances in 1957, under the flawed *Tinker* analysis the Little Rock Central High School would have been justified in denying the attendance of the "Little Rock Nine" based on the disruption their "mere presence in the school" would have created.

Modern scenarios that the Second Circuit's decision could support include a school's prohibition of an Iraqi/Afghani student on the basis that his presence at a school attended by students with parents serving in the military could lead to school disruptions, thereby justifying the student's prohibition from the school; a school could prohibit the attendance at school of an individual with physical deformities that disrupt other students; and as in this case, a school could prohibit an individual from attending based on an unsubstantiated rumor, the belief in which could disrupt the educational mission of the school.

Such reactions by the school legitimize the basest motivations that are often at the heart of false rumors, and the visceral reactions that teenage students are subject to. Rather than standing against

such reactions in this case, the School chose to placate the mob mentality of the student body and sweep Daniel out of sight, and out of mind.

Although there may have been a number of Latino students at Daniel's high school who would react strongly against him, the First Amendment required the school to accord him the protection that he was entitled to and the opportunity to explain the false rumors that were spread against him. As in the case of the Arkansas 9, even where a student's "mere presence" would create a disturbance at a school, the overriding concerns for the individual student's fundamental rights outweigh the potential disruption.

II.
Review Is Warranted Because The Second Circuit's Opinion Is Based on the Erroneous Premise That *Tinker's* Analysis Applied To The Non-Political "Speech" At Issue In This Case

The Second Circuit ignored the content of the speech at issue in this case, and instead focused on the claimed disruptive effect the speech would have on the school. The result was that Daniel's legitimate attempt to refute the false rumor against him was suppressed by the School, for fear of the disturbance his "mere presence" would create. Such an unjust result is evidence that the Second Circuit's application of *Tinker* to "all student speech" was erroneous. Where, as in the present case, the school's conduct actually helped foster the false rumor against the plaintiff, the school officials and the lower courts should have recognized plaintiff's First

Amendment right to refute the rumor spread against him.

"Tinker does not prescribe a uniform 'one size fits all' analysis. The Court must consider the context of the speech and the nature of the school's response." Lowery v. Euverard, 497 F 3d 584, 588 (6th Cir. 2007). Looking at the context alone and proclaiming that any and all speech is proscribed by the situation is not acceptable.

In Morse v. Frederick, 551 U.S. 393 (2007), C.J. Roberts delivered the opinion of the Court in which Justices Scalia, Kennedy, Thomas, and Alito joined. The case involved a student at a school-supervised event who unfurled a banner reading "BONG HiTS 4 JESUS". When the principal instructed the student to take down the banner, the student refused. The principal confiscated the banner and suspended the student. The Supreme Court opinion upheld the principal's conduct and created an exception to *Tinker* where the school may restrict student speech that "is reasonably viewed as promoting illegal drug use". *Id. at 403.* Thus, pursuant to Supreme Court precedent, school officials may not impose view-point based restrictions on student speech unless (1) the expression leads school officials to reasonably forecast a substantial disruption or material interference with school activities, Tinker, 393 U.S. at 514; (2) the students expression might reasonably be perceived by the public as bearing the imprimatur of the school, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); or (3) the students expression can be reasonably viewed as promoting illegal drug use, Morse, 551 U.S. at 403. Schools may impose

viewpoint-neutral, content-based restrictions on student expression that is vulgar, lewd, obscene, or plainly offensive, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

Justice Breyer's concurring opinion in Morse recognized that additional clarity is needed on the application of the Supreme Court's tests in student speech cases:

> But unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply. See, e.g. Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 326 (C.A.2 2006) (It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination).

Id. at 430.

The present case provides as opportunity for the Court to clarify that *Tinker* does not apply to the non-political speech at issue in this case. The speech is set forth in a letter that Daniel drafted and submitted to the School, simply setting forth that he never made the racial comment attributed to him.

As Justice Stevens set forth in his dissenting opinion in Morse, with whom Justices Souter and Ginsberg joined, "In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor

expressly advocates conduct that is illegal and harmful to students." *Id.* at 435. The speech at issue in this case clearly does neither.

Contrary to *Tinker* and its progeny, Daniel did not seek to make any political statements in school; did not offer any lewd or sexually explicit remarks; and did not seek to promote any illegal drug use. He simply wanted to return to his high school and explain that he never made the racial remark that was attributed to him. *Tinker*, with its emphasis on the effect the speech would have on the operation of the school, is a poor and inadequate vehicle to address a student's desire to refute a rumor that was spread against him in the school, especially where school officials bore some responsibility for the rumor.

In Guiles ex rel. Guiles v. Marineau, 461 F.3d 320 (C.A.2 2006), the plaintiff student's rights under the First Amendment were violated when school officials put duct tape over a t-shirt depicting President George W. Bush in an unfavorable light using images of drugs and alcohol. Judge Cardamone delivered the opinion of the Court with Judge Pooler and Sotomayor joining. The opinion noted the lack of clarity in student-speech cases:

> We pause here to acknowledge some lack of clarity in the Supreme Court's student-speech cases. *Tinker* involved Political viewpoint-based discrimination and established a "material and substantial interference" test that permits schools to restrict student speech only where, as noted, "necessary to avoid material and

> substantial interference with schoolwork or discipline." 393 U.S. at 511, 89 S.Ct. 733. It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination.

Id. at 326 (emphasis added).

The court then discussed how *Fraser* emphasized the distinction between the political message of the armbands in *Tinker*, which upheld "the students' right to engage in a nondisruptive, passive expression of a *political viewpoint*" Fraser, 478 U.S. at 680, and the sexual content of the speech in *Fraser*, the penalties for which were "unrelated to any *political viewpoint* and thus did not implicate the rule of *Tinker*." *Id.* at 685. *See* Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (stating that *Tinker* "held that students' rights to freedom of expression of their *political views* could not be abridged by reliance upon an 'undifferentiated fear or apprehension of disturbance' arising from such expression" (emphasis added)). Guiles, 461 F.3d at 326.

The Second Circuit then mistakenly proceeded "according to the understanding that *Tinker* applies to *all non-school sponsored student speech* that is not lewd or otherwise vulgar ..." *Id.* (emphasis added). The Second Circuit's application of *Tinker* to "all non-school sponsored speech" in Guiles was carried forward in the current Defabio case, and directly led

to the bizarre result prohibiting Daniel's innocuous speech dispelling the rumors that had been circulated against him. Clearly, the reasoning in *Tinker* and its progeny is not applicable in the world of personal speech to defend against false rumors. Yet, the application of *Tinker* in the present case supported the School's conduct in silencing a student who sought to defend himself against a false rumor that threatened his ability to even live in the community. Such a result is anathema to common sense and the First Amendment principles upon which *Tinker* was based.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: January 11, 2011

Respectfully submitted,

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APPENDIX A

United States District Court,
E.D. New York.
Daniel DeFABIO, Patricia DeFabio, and Michael Rusinsky,
Plaintiffs,
v.
EAST HAMPTON UNION FREE SCHOOL DIST., et al.,
Defendants.
No. 07-CV-1717 (JFB)(ARL).
Oct. 1, 2009.

Opinion, 2009 WL 3113111, amended and superseded.

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Jeltje DeJong, Esq., David H. Arnsten, Esq., Kelly E. Wright, Esq., of Devitt, Spellman, Barrett, LLP, Smithtown, NY, For defendants.

AMENDED MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiffs Daniel DeFabio ("Daniel" or "D.D."), Patricia DeFabio ("Ms. DeFabio") and. Michael Rusinsky ("Mr. Rusinsky") (collectively, "plaintiffs") bring this action, pursuant to 42 U.S.C. § 1983, against the defendants, alleging violation of Daniel's constitutional rights under the First and Fourteenth Amendments to the United States Constitution, including freedom of speech, freedom of association, due process and equal protection. Plaintiffs also claim the defendants slandered and libeled Daniel under state law, and committed other violations of state law. Plaintiff further asserts that defendants' actions caused Ms. DeFabio and Mr. Rusinsky to suffer humiliation, embarrassment, depression, mental anguish, anxiety, and other pain and suffering, and to

expend money on education, travel, medical and mental health expenses in order to make themselves whole.

The claims relate to events at East Hampton High School on April 26, 2004, while Daniel was a sophomore at the school, and the school officials' decisions on that day, and in the time period that followed, with respect to Daniel. Specifically, plaintiffs allege that, on April 26, 2004, a racially offensive comment was falsely attributed to Daniel concerning the death of a Hispanic student and that the school violated his rights to freedom of speech and association by preventing him from proclaiming his innocence at the school over the public announcement system, at a school assembly, or by some other mechanism. Plaintiffs further allege that school officials' decision to expel Daniel from the school-allegedly without notice, a proper hearing, or the ability to fairly confront his accusers-violated his procedural and substantive due process rights, as well as his equal protection rights.

Defendants now move for summary judgment. For the following reasons, defendants' motion for summary judgment is granted on the Section 1983 claims. The *468 Court declines to exercise supplemental jurisdiction over any state claims and, thus, dismisses those claims without prejudice.

I. Background

A. Facts

The facts described below are taken from the parties' depositions, affidavits, exhibits and the parties' Local Rule 56.1 statements of facts. Upon consideration of a motion for summary judgment, the Court shall construe the facts in the light most favorable to the non-moving party. See Capobianco v. City of N.Y., 422 F.3d 47, 54-55 (2d Cir.2005).

During the school year of 2003-2004, Daniel was a tenth grade student at East Hampton High School. (Defendants'

Local Rule 56.1 Statement of Facts ("Defs.' 56.1") ¶ 1.) FN1 Ms. DeFabio is Daniel's mother. (Defs.' 56.1 ¶ 2.) Mr. Rusinsky is not Daniel's biological or adoptive father, and is not married to Ms. DeFabio, but he resides in the family home of Daniel and Ms. DeFabio, considers himself Daniel's stepfather, and was a parental authority with whom the school could communicate concerning Daniel. (Rusinsky Dep. at 7, 13-19.)

FN1. Where only one party's Rule 56.1 statement is cited, the opposing party does not dispute that fact or has offered no evidence to controvert that fact.

On April 24, 2004, a Hispanic student from East Hampton High School was killed in a motorcycle accident. (Defs.' 56.1 ¶ 4.) The following Monday, April 26, 2004, was a day of mourning in East Hampton High School. (Defs.' 56.1 ¶ 4.) That morning, Daniel asserts that, as he was walking in the hall to his third period class, he heard a student say "one down, 40,000 to go," in an apparent reference to the student who died. (Daniel Dep. at 24.) According to Daniel, he (Daniel) then repeated this statement to another student, D.A. (Defs.' 56.1 ¶ 6; Daniel Dep. At 33.) Specifically, Daniel testified that he whispered "I just heard someone say 'one down, 40,000 to go' " to D.A. with his hand cupped around D.A.'s ear.FN2 (Daniel Dep. at 34.) Throughout that day, word spread through school that Daniel was the originator of the "one down, 40,000 to go" comment. (Defs.' 56.1 ¶ 7.) For example, Ralph Naglieri, who was a guidance counselor and was in the auditorium that had been designated for students as an area where they could mourn, spoke with a student, S.U, and, S.U. was very upset and speaking loudly about a student in the cafeteria who had made a comment about Hispanic students. (Naglieri Dep. at 8-10.) S.U. advised both Naglieri and another school staff member that people were very upset over the comment and pointed Daniel out as the person who had made the comment. (Id. at 10-11.)

FN2. As noted infra, D.A. disputes that Daniel qualified the statement to him with "I just heard," and believed Daniel was the originator of the statement.

Also, during eighth period that afternoon, while Daniel was in the cafeteria celebrating a friend's birthday, a group of 4 or 5 Latino students came up to him yelling about a racist comment. (Daniel Dep. at 39-41.) Daniel did not fully understand what they were saying, but one of them threw something at Daniel. (Id. at 41) Daniel then told them that he had done nothing wrong, and they walked away. (Id.) Daniel was scared and thought he was going to be beaten up. (Defs.' 56.1 ¶ 9.) A few minutes after this confrontation, Naglieri approached Daniel's table and "physically grabbed" him and told him, "come with me." (Daniel Dep. at 45-46.) Daniel did not resist because he was "pretty scared." (Defs.' 56.1 ¶ 10.)

*469 Mr. Naglieri took Daniel to the nurse's office. Daniel had a sense that these incidents had to do with the "one down, 40,000 to go" comment. (Defs.' 56.1 ¶ 12.) Mr. Naglieri asked Daniel about the comment, and Daniel denied that he originated the remark. (Defs.' 56.1 ¶ 13; Daniel Dep. at 49-50.) Daniel explained to Mr. Naglieri that he overheard the statement being made by someone else and that he merely repeated it. (Defs.' 56.1 ¶ 14.) An Assistant Principal then came to the nurse's office and asked Daniel if he made the statement. Daniel said no. (Defs.' 56.1 ¶ 15.)

Daniel was in the nurse's office for about twenty minutes. (Daniel Dep. at 50, 54.) During this time, there were "a lot" of Latino students looking into the office through a window, which made Daniel uncomfortable and afraid. Daniel heard people outside yelling that they were going to kill him. (Defs.' 56.1 ¶¶ 16-17.) Principal Scott Farina called the police to escort Daniel from school, and Daniel "ran" out with an Assistant Principal and the police officer on either side of

him. (Defs.' 56.1 ¶¶ 18-19; Daniel Dep. at 56-58.) As Daniel left, the Latino students he saw outside the nurse's office were still there, and some were yelling in Spanish. (Daniel Dep. at 58-59.) People at school made threats that they would kill Daniel and bomb his house, making him even more frightened than before. (Defs.' 56.1 ¶ 20.)

Ms. DeFabio was informed that Daniel was being sent home from school because there were 150 students who wanted to knock down his door and beat him up. (Defs.' 56.1 ¶ 21.) That evening, Principal Farina did not tell Ms. DeFabio that Daniel was suspended, but told her that he should stay home for a few days because it was not safe for him to return to school until the situation calmed. (Defs.' 56.1 ¶¶ 22-24.)

The parties dispute whether Daniel was suspended as of being sent home on April 26, 2004. Defendants contend that he was simply sent home for his safety at that point, and was not suspended. (Farina Dep. at 20.) Plaintiffs, however, contend that he was suspended, as he was removed from school and not permitted to return. (Pls.' 56.1 ¶ 24.) They further contend that the situation had calmed down by the time the police arrived at the school and, therefore, there was no need to send Daniel home. (Farina Dep. at 40.)

On Tuesday, April 27, 2004, Daniel prepared a letter proclaiming his innocence and asked Principal Farina if he could read it over the loudspeaker. (Defs.' 56.1 ¶ 25.) Principal Farina denied this request, stating that he thought it would make the students angrier and would cause more problems in the school. (Defs.' 56.1 ¶ 25.) Daniel also requested permission to read the statement at a school assembly, but this was also denied. (Defs.' 56.1 ¶ 26.)

The parties dispute whether an investigation into the issue was conducted between April 26, 2004 and April 30, 2004. Defendants contend that Principal Farina conducted an

investigation, in which he interviewed Daniel and several other students to get their recollections of what had occurred. (Farina Dep. at 20-21.) Plaintiffs point to the findings of the Commissioner of Education-namely, that "the principal admitted that his investigation did not include any subsequent interviews with D.D. after the day of the incident and there were no written reports of any investigation to substantiate the charges," to support their contention that no investigation was conducted. (Commissioner's Decision, dated August 7, 2006, at 5.)

On April 28, 2004, a meeting was held between Ms. DeFabio, Mr. Rusinsky, Principal Farina, guidance counselor Caryn *470 Lieber, and Assistant Principal Michael Burns. Principal Farina advised that Daniel's continued absence was necessary in order to calm the situation. (Defs.' 56.1 ¶ 28.) At that time, Daniel had mixed feelings about returning to school-he wanted to in one respect, but he remained scared. (Defs.' 56.1 ¶ 29.)

On April 30, 2004, plaintiffs were advised that Daniel was being suspended from school for 5 days and that a Superintendent's hearing might be convened. (Defs.' 56.1 ¶ 30.) Between April 26, 2004 and May 7, 2004, plaintiff received a couple of threatening phone calls to his house and cell phone. (Defs.' 56.1 ¶ 31.) The voicemail left on his cell phone was in Spanish. (Defs.' 56.1 ¶ 31.) Principal Farina heard threats at the school that people were going to light Daniel's house on fire. (Defs.' 56.1 ¶ 32.) As a result, police stayed in the vicinity of Daniel's house for about a week after April 26, 2004. (Defs.' 56.1 ¶ 32.)

On May 7, 2004, a Superintendent's Hearing was held. (Defs.' 56.1 ¶ 33.) Two students, D.A. and N.C., testified against Daniel at the hearing. (Defs.' 56.1 ¶ 34.) At the hearing, D.A. attributed the offensive comment to Daniel and denied that Daniel prefaced the comment by saying "I heard someone

say" and, thus, believed that Daniel was the originator of the comment. (Commissioner's Decision, dated August 6, 2006, at 5.) N.C. admitted that she did not hear the exchange between Daniel and D.A. (Id. at 6.) Daniel testified at the hearing and admitted he made the comment to D.A., but denied he was the originator of the comment; rather, he maintained that he had overheard the comment in the hallway and simply repeated it. (Id. at 5.)

The Superintendent found Daniel guilty of making the racist comment and suspended him from school for the remainder of the school year. (Defs.' 56.1 ¶ 35.) After the hearing, Principal Farina escorted Daniel to a meeting with twelve students representing the school's Latino community. (Defs.' 56.1 ¶ 36.) Daniel explained his version of events at the meeting and distributed a copy of the statement he had wanted to read over the loudspeaker. (Defs.' 56.1 ¶¶ 37-38.) According to Daniel, most of the students appeared not to believe Daniel's story and commented that the fact that Daniel did not make a statement earlier and did not return to school made it look like he was lying. (Daniel Dep. at 91.) Principal Farina explained to the students that he had not permitted Daniel to return to school and that he had denied Daniel's request to disseminate a statement explaining his version of events. (Defs.' 56.1 ¶ 40.)

Daniel was home tutored for the remainder of the school year. (Daniel Dep. at 100-101.) The parties dispute when the tutoring began-defendants claim that Daniel was tutored beginning around May 3, 2004 (Defs.' 56.1 ¶ 41), while plaintiffs contend that tutoring began on May 10, 2004. (Daniel Dep. at 101.)

According to Daniel, that summer, Daniel received threats from various, unknown Latino individuals while he was working. (Defs.' 56.1 ¶ 48.) One of them almost came onto the boat Daniel was working on to fight him, but was stopped

by the first mate. (Daniel Dep. at 97.) On a couple of other occasions, when Daniel was in the car, people would curse and yell at him and say they were going to kill him. (Defs.' 56.1 ¶ 49.) On one occasion, a Latino student saw him at a gas station and said Daniel was lucky he did not "pop" him. (Defs.' 56.1 ¶ 50; Daniel Dep. at 105.) Daniel never reported these incidents to the police. (Defs.' 56.1 ¶ 51.)

During the summer of 2004, Ms. DeFabio and Mr. Rusinsky met with Principal Farina to discuss Daniel's return to school. *471 (Defs.' 56.1 ¶ 46.) Plaintiffs did not feel that the school was taking adequate measures to secure Daniel's safety, and, therefore, decided that he would have to leave the state to be safe. (Defs.' 56.1 ¶ 47; Pls.' 56.1 ¶ 47.) The parties dispute when the decision not to return to East Hampton High School was made by plaintiffs. Plaintiffs contend that Ms. DeFabio made the decision in August 2004. (Daniel Dep. at 107-08.) Defendants contend that plaintiff never expected to return to East Hampton High School during the summer of 2004. (Defs.' 56.1 ¶ 52.) According to the plaintiffs, they made the joint decision that Daniel should go to California to school for his own safety, based on threats that had been made in-person, over the phone and through third parties. (Defs.' 56.1 ¶ 53.)

Plaintiffs appealed the decision of the Superintendent to the East Hampton Board of Education, but the appeal was denied. (Defs.' 56.1 ¶ 42.) Plaintiffs then sought a reversal of the suspension and expungement of Daniel's record before the New York State Commissioner of Education. (Defs.' 56.1 ¶ 43.) The Commissioner sustained the appeal, overturned the Superintendent's decision and ordered that the incident be expunged from Daniel's student record. (Defs.' 56.1 ¶ 44.) The Commissioner explained that "the superintendent failed to discuss any facts or testimony of the witnesses and his decision does not demonstrate that he addressed or weighed their credibility or demeanor." (Commissioner's Decision,

dated August 7, 2006, at 5.) Thus, the Commissioner concluded the following: "While I recognize the highly charged emotional atmosphere surrounding this event, and do not in any way condone the biased nature of the comment, under the circumstances of this case and the record before me, I am constrained to determine that the record does not contain sufficient and competent evidence that D.D. generated the offensive comment and thus engaged in the objectionable conduct as charged." (Id.)

B. Procedural History

Plaintiffs filed a complaint in this action on April 25, 2007. On May 30, 2007, defendants filed an answer to plaintiffs' complaint. On November 10, 2008, defendants filed a motion for summary judgment. Plaintiff filed his opposition on January 7, 2009. Defendants filed a reply on January 20, 2009. Oral argument was held on May 28, 2009. The Court has considered all of the parties' submissions.

II. Summary Judgment Standard

The standards for summary judgment are well settled. Pursuant to Federal Rule of Civil Procedure 56(c), a court may not grant a motion for summary judgment unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Globecon Group, LLC v. Hartford Fire Ins. Co., 434 F.3d 165, 170 (2d Cir.2006). The moving party bears the burden of showing that he or she is entitled to summary judgment. See Huminski v. Corsones, 396 F.3d 53, 69 (2d Cir.2004). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir.2004); see also Anderson

v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Once the moving party has met its burden, the opposing party "must do more *472 than simply show that there is some metaphysical doubt as to the material facts ... [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir.2002) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). As the Supreme Court stated in Anderson, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted). Indeed, "the mere existence of some alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. Id. at 247-48, 106 S.Ct. 2505. Thus, the nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth "concrete particulars" showing that a trial is needed. R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir.1984) (internal quotations omitted); Tufariello v. Long Island R.R., 364 F.Supp.2d 252, 256 (E.D.N.Y.2005). Accordingly, it is insufficient for a party opposing summary judgment "merely to assert a conclusion without supplying supporting arguments or facts." BellSouth Telecomms., Inc. v. W.R. Grace & Co., 77 F.3d 603, 615 (2d Cir.1996) (internal quotations omitted).

III. Discussion FN3

FN3. As a threshold matter, although both Daniel and Patricia DeFabio have standing to sue, defendants challenge Michael Rusinksy's standing to sue in this action on the basis that he "has no legally recognized relationship with Daniel DeFabio." (Defendants' Memorandum of Law, at 8.)

Plaintiffs contend that Mr. Rusinsky has standing because he has regularly resided in Daniel's household and, therefore, is considered "immediate family" under New York law. (Plaintiffs' Memorandum of Law, at 21.) However, it is undisputed that Mr. Rusinsky is neither a biological or an adoptive parent, nor is he married to Daniel's mother, and Mr. Rusinsky is not regarded as a step-parent by virtue of his relationship. See Eckhardt v. Eckhardt, 37 A.D.2d 629, 323 N.Y.S.2d 611 (N.Y.App.Div.1971). Thus, the Court agrees with defendants and concludes that mere residence in a household is insufficient to confer standing on Mr. Rusinsky to assert claims here. In any event, even assuming arguendo Mr. Rusinsky also had standing to sue, his claims would not survive summary judgment on the merits for the same reasons as the other plaintiffs, for the reasons discussed infra.

A. The Underlying Section 1983 Claims

[1] [2] [3] To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must show: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; (2) by a person acting under the color of state law. 42 U.S.C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." Sykes v. James, 13 F.3d 515, 519 (2d Cir.1993). Plaintiffs contend that defendants violated Daniel's constitutional rights to free speech, freedom of association, due process and equal protection. Defendants now move for summary judgment on the grounds that, based on the evidence in the record, no reasonable juror could find that defendants violated any of Daniel's constitutional rights. The Court will address each issue in turn.

1. Freedom of Speech Claim

Plaintiffs contend that defendants violated Daniel's First Amendment rights by denying him an opportunity to communicate his prepared statement to the student body in a

number of ways. Specifically, plaintiffs contend that defendants should have allowed Daniel's statement about the April 26, 2004 events: (1) to be read over the school intercom system; (2) to be read at an all-school assembly in the auditorium;*473 or (3) to be distributed to the students.

[4] [5] Defendants contend that because such speech required "the pulpit of the school's PA system and/or auditorium" or distribution by school administration it would be "school-sponsored speech" and, therefore, may be censored "so long as censorship is reasonably related to legitimate pedagogical concerns"-in this case, a concern that such speech would "further incite an already tense situation" and "could foreseeably disrupt the student body and wreak havoc in the school." (Defendant's Memorandum of Law, at 11-12 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)).) They note that plaintiff was not prevented from communicating with his peers via telephone, e-mail, or any other ordinary channel; "rather he sought for the school to provide him with the means and medium to communicate by either public address system or a school-wide assembly." (Defendant's Memorandum of Law, at 11.) Plaintiffs, however, contend that the appropriate standard to apply here is the one set forth in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which states that student expression may be restricted where it "would substantially interfere with the work of the school," or would cause "material and substantial interference with schoolwork or discipline." Tinker, 393 U.S. at 511, 513, 89 S.Ct. 733. As set forth below, although plaintiffs made a number of requests that would constitute school-sponsored speech and be analyzed under Hazelwood, they also allege that (prior to any suspension) Daniel was prevented from returning to school and speaking to students without any assistance from the school. Thus, the school's decision is properly analyzed under the Tinker standard, rather than

Hazelwood, and the undisputed facts demonstrate that defendants are entitled to summary judgment on this claim under Tinker.

a. Applicable Level of Constitutional Scrutiny

[6] ☑ It is axiomatic that "[f]reedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered." Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 211 (2d Cir.1997). Thus, when determining the level of constitutional scrutiny to be applied to state actions regulating speech, the court should first consider the threshold issue regarding the type of forum. See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 625 (2d Cir.2005) ("Because the level of judicial scrutiny that must be applied to state actions inhibiting speech varies with the nature of the forum in which the speech occurs, we must first consider what sort of forum had been created....").

[7] ☑ [8] ☑ [9] ☑ [10] ☑ There are "four categories [of fora for expression] that, correspondingly, fall along a spectrum of constitutional protection." Id. The categories from highest protection to lowest are the traditional public forum, the designated public forum, the limited public forum, and the non-public forum. See Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 142-43 (2d Cir.2004). A school is generally a non-public forum, a place in which the government "does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it." Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (citation and internal quotation marks omitted); see also M.B. v. Liverpool Cent. Sch. Dist., 487 F.Supp.2d 117, 133 (N.D.N.Y.2007) ("Generally, school facilities are nonpublic forums."). "School facilities may be deemed *474 to be public forums only if school authorities have by policy or practice opened

those facilities for indiscriminate use by the general public, or by some segment of the public.... If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created...." Hazelwood, 484 U.S. at 267, 108 S.Ct. 562 (internal citations and quotation marks omitted). "A 'designated public forum' is a place not traditionally open to public assembly and debate-a public school, for example-that the government has taken affirmative steps to open for general public discourse." Peck, 426 F.3d at 626. A limited public forum is created when the state "opens a non-public forum but limits the expressive activity of certain kinds of speakers or to the discussion of certain subjects." Hotel Employees & Rest. Employees Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 545 (2d Cir.2002).

[11] ☑ The forum determines the type of constitutional scrutiny that applies to the restriction of speech. Speech in a public forum may only be restricted on the basis of content if "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." Make the Road by Walking, 378 F.3d at 142. "Rules governing the content of speech in a limited public forum must be reasonable and viewpoint-neutral." M.B., 487 F.Supp.2d at 132. Courts will "uphold a governmental restriction on speech in a nonpublic forum as long as the restriction is reasonable and viewpoint-neutral." Perry v. McDonald, 280 F.3d 159, 169 (2d Cir.2001).

Here, there is no question that the high school was a non-public forum. There is absolutely no evidence that the defendants, as it related to the events at issue in this case, opened the school facilities to use and expression by the public or some segment of the public. In fact, plaintiff does not even make such an assertion. Thus, the school is a non-public forum in which content can be regulated in a

reasonable manner. See, e.g., Peck, 426 F.3d at 626-27 (holding that school was a non-public forum).

[12] ☑[13] ☑However, further analysis is required in this case because the Supreme Court has also established specific standards for analyzing the level of constitutional expression afforded to students in the school environment, focusing on the nature of the speech, whether the speech is sponsored by the school, and the reasons for regulating it. Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker, 393 U.S. at 506, 89 S.Ct. 733, their constitutional rights "are not automatically coextensive with the rights of adults in other settings," Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Thus, the First Amendment standards need to be "applied in light of the special characteristics of the school environment." Hazelwood, 484 U.S. at 266, 108 S.Ct. 562 (citation and internal quotation marks omitted). In particular, the Supreme Court has analyzed different categories of school speech and applied separate standards of review to each category: (1) schools may prohibit student speech that is vulgar, lewd, indecent, or plainly offensive because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," Bethel Sch. Dist. No. 403, 478 U.S. at 683-85, 106 S.Ct. 3159; (2) schools may exercise editorial control over speech that is school-sponsored "so long as their actions are reasonably related to legitimate pedagogical concerns," Hazelwood, 484 U.S. at 273, 108 S.Ct. 562; (3) schools may "restrict student speech at a school event, when that speech is reasonably *475 viewed as promoting illegal drug use," Morse v. Frederick, 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007); (4) as to all other speech, the school cannot suppress based on content unless the school official reasonably concludes that the speech will "materially and substantially disrupt the work and discipline of the school,"

Tinker, 393 U.S. at 513, 89 S.Ct. 733. See also Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 325 (2d Cir.2006) (summarizing First Amendment jurisprudence involving school speech).

[14] ☑ In the instant case, there is no assertion that the speech at issue was offensive, nor was it related to drug use. Thus, none of the circumstances presented in Bethel or Morse are at issue here. However, in order to determine which standard applies, the Court must analyze whether the speech that plaintiff alleged was prohibited was school-sponsored speech. "The question whether the First Amendment requires a school to tolerate particular speech ... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." Hazelwood, 484 U.S. at 270, 108 S.Ct. 562 (emphasis added). Whether speech is deemed "school-sponsored" such that the Hazelwood standard applies, relies on a determination of whether the speech " 'might reasonably have been perceived to bear the imprimatur of the school.' " Romano v. Harrington, 725 F.Supp. 687, 690 (E.D.N.Y.1989) (quoting Hazelwood, 108 S.Ct. at 569). This includes "activities [that] may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." Hazelwood, 484 U.S. at 270-71, 108 S.Ct. 562.

Here, plaintiffs assert that, after an article about the incident appeared in the East Hampton Star on April 29, 2004, Daniel requested an opportunity to respond to the rumors by speaking to the students in one or more of the following manners: (1) have Daniel read his statement at a school assembly called in the auditorium; (2) have Daniel read his statement at the school to all students over the school's public announcement system; (3) have the school circulate a copy of

Daniel's statement throughout the school to all students; or (4) allow Daniel to return to school and distribute his statement to students on his own (without school assistance) and/or speak to them about it during non-instructional time. Plaintiffs allege that defendants refused to allow him to return to the school to give the statement in any of these manners, including on his own without any school assistance. The Court will analyze each one of these issues in turn.

First, asking the school administration to call students into the auditorium to listen to Daniel read his statement at a school assembly during school hours on school property might reasonably have been "perceiv[ed] to bear the imprimatur of the school." Hazelwood, 484 U.S. at 281, 108 S.Ct. 562. Therefore, such speech constitutes school-sponsored speech. See, e.g., Poling v. Murphy, 872 F.2d 757, 762 (6th Cir.1989) (finding an election assembly to be "school-sponsored" where the school scheduled the assembly during school-hours on school property, and "made attendance compulsory").

To the extent that plaintiffs contend that Daniel merely wanted to use the auditorium with no assistance from the school administration, the school auditorium was a non-public forum to which Daniel had no right to access on that basis. Plaintiffs have pointed to no evidence that the school had previously allowed the use of a school assembly indiscriminately by the general *476 public, or even by individual students or student groups. Plaintiffs suggest that some type of public forum was created by the school because they had a grieving session in the school auditorium on April 26, 2004 regarding the student's death (at which students spoke about the racially charged comment attributed to Daniel) and, thus, Daniel was entitled to his own student assembly to respond. In particular, plaintiffs contend that:

[o]n April 26, 2004, school officials sanctioned the open forum in the school's auditorium for the purpose of eulogizing the student who had died. After the incident, that same forum was admittedly used by students to express their emotions and feelings about the racially charged comment attributed to Daniel. (Kuntz. Aff. ¶ 14.) School officials testified that many students would come up to the mike and "express their thoughts about the student that passed away ... and why did this student say these things." (Kuntz. Aff. ¶ 14.) Daniel was not provided with the same opportunity despite the fact that the school had created a forum that very same week for speech it found acceptable.

(Plaintiffs' Memorandum of Law, at 13.) To the extent that plaintiffs contend that this assembly was sufficient to convert the auditorium into a public forum, such that the school administration could not deny Daniel an opportunity to hold an assembly there on a topic of his choosing, the Court finds such argument unpersuasive. It is undisputed that (1) the assembly was a school-sponsored assembly designed to aid students in coping with loss and sadness from a student's death; and (2) the assembly was scheduled prior to the making of the comment at issue and was not intended to encompass the reactions to that comment. The school opened the auditorium for a narrow period of time to discuss the narrow topic of a student's death. Therefore, it was analogous to class time in that the school was holding the event for a particular pedagogical aim. The fact that the assembly was opened to students to make comments does not change the nature of the forum. Nor does the fact that students may have made comments about Daniel and the alleged statement during that assembly turn the auditorium into a public forum for use by any student. There is no indication that students wishing to speak in support of Daniel were prevented from doing so during the assembly on April 26th. Moreover, Daniel did not prepare his letter and make the request to give his statement to students until April 27th. Under these

circumstances, there is no basis for requiring the school to hold another assembly specifically to create an opportunity for Daniel to respond to prior, spontaneous statements by other students. See Hazelwood, 484 U.S. at 267, 108 S.Ct. 562 ("School facilities may be deemed to be public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public.... If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created ...."); see also Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1227 (10th Cir.2009) ("school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate' ") (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). In short, the fact that students used a grieving session in the auditorium to voice objections to the offensive comment attributed to Daniel about the student's death did not convert the auditorium into a public forum such that Daniel had a right to speak at a separate school assembly to respond.

Second, the use of the school's public announcement system would also turn *477 Daniel's private statement into school-sponsored speech. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) ("The delivery of [a religious] message-over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer-is not properly characterized as 'private' speech.").

Third, the distribution of a statement by the school also would constitute school-sponsored speech as it may be perceived as a school publication bearing the imprimatur of the school. Any communication which uses the resources or distribution system of the school for dissemination of speech

may be reasonably seen as school-sponsored. See, e.g., Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 98 (3d Cir.2009) (courts have found that show and tell presentations could " 'appear to bear the school's seal of approval' ") (citation omitted).

Therefore, if plaintiffs were only alleging that Daniel was denied access to give the statement at a school assembly, over the public address system, or through a mass distribution of the statement by the school, the school's conduct would be analyzed under the Hazelwood standard for the regulation of school-sponsored speech. However, plaintiffs assert more than that. Plaintiffs assert that Daniel was prohibited from returning to the school at all to distribute his written statement without assistance from the school and/or speak to other students about it during noninstructional hours. FN4 Given plaintiffs' assertion that Daniel also was prohibited from returning to school to disseminate his statement in a manner not sponsored by the school, the Court must analyze the school's conduct under the more stringent Tinker standard, rather than the Hazelwood standard.FN5

FN4. The Court notes that the focus of plaintiffs' complaint, as well as the testimony at the depositions and oral argument, was the school's refusal to give Daniel access to the school's public address system and/or a school assembly. As noted above, such speech would clearly be school-sponsored and would be analyzed under Hazelwood. However, the Court liberally construes the complaint to include a general allegation that Daniel was also denied the ability and option to return to the school and convey his speech without any assistance from the school.

FN5. The Court notes that a school can place certain restrictions on handbilling at schools even if such speech is not school-sponsored. School "hallways constitute nonpublic forums." M.A.L. v. Kinsland, 543 F.3d 841, 846 (6th

Cir.2008). As such, schools have the ability to regulate the time, place, and manner of distributions in the hallways. "Prohibiting handbilling in the hallway between classes is ... reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter caused when the recipient indiscriminately discards the handout." Muller ex rel. Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1543 (7th Cir.1996) ("When, where, and how children can distribute literature in a school is for educators, not judges, to decide provided [such choices] are not arbitrary or whimsical. [Requiring] the student and principal to determine cooperatively an appropriate time and place for the distribution .... permits flexibility so that the unique needs of the school and the student can be accommodated. There is nothing a priori unreasonable about that."). Plaintiffs have not identified any other student or organization who was permitted to distribute literature in the hallway. Therefore, plaintiffs have produced no evidence that defendants have opened the hallway up to student distribution of leaflets. See, e.g., M.A.L. v. Kinsland, 543 F.3d 841, 847 (6th Cir.2008) ("Jefferson school authorities have done nothing to indicate that the Jefferson Middle School hallways have been opened for indiscriminate use by the public, and the hallways therefore constitute a nonpublic forum. The school district accordingly is entitled to put time, place, and manner restrictions on hallway speech so long as the restrictions are viewpoint neutral and reasonable in light of the school's interest in the effectiveness of the forum's intended purpose."). However, as noted above, because plaintiffs assert that the prohibition by the defendants went beyond restrictions on when, where and how he did it, but rather extended to completely prohibiting him from communicating his statement in any manner at the school (including by not letting him into the school), Tinker is the applicable standard.

*478 b. Analysis under Tinker

As a threshold matter, the Court notes that, with respect to the First Amendment claim, the period of time that is at issue is from April 26, 2004, which is the date of the events at the school regarding the alleged comments, and April 30, 2004, which is the date on which the school suspended Daniel for 5 days. Once the 5-day suspension took place on April 30, 2004, and once Daniel was suspended for the remainder of the school year after a Superintendent's Hearing on May 7, 2004, the First Amendment claim became moot because Daniel was no longer permitted to be at the school. Although there could be potential separate claims for such decisions by the school (which are discussed infra) under the Due Process or Equal Protection Clauses, the existence of any such claims is independent of the First Amendment issue. Therefore, the critical question for the First Amendment claim is the following: whether, between April 26, 2004 and April 30, 2004, school officials reasonably concluded that the speech at issue-Daniel's request to provide a written or oral statement to the students regarding the rumored comment-would "materially and substantially disrupt the work and discipline of the school." Tinker, 393 U.S. at 513, 89 S.Ct. 733.

Defendants argue that the principal denied Daniel's request to return to school to address other students regarding the rumored comment because he feared that such an event would lead to even greater hostility toward Daniel and would create disruption in the school and an unsafe environment for Daniel and the student body. Plaintiffs contend that there was no basis for such a conclusion. As set forth below, the Court agrees with defendants and concludes that summary judgment is warranted on the First Amendment claim because, based upon the undisputed facts, no rational jury could find that the defendants, in prohibiting Daniel's return to the school and speech regarding the incident, did not reasonably conclude that such speech would materially and substantially disrupt the work and discipline of the school.

The undisputed facts demonstrate that both on the day of the rumored comment by Daniel, as well as the weeks that followed, there was overwhelming basis for concern about Daniel's safety if he were to return to school for any reason (including to engage in some type of speech to the students). In particular, plaintiffs did not controvert the following facts from the events of April 26, 2004 regarding threats to Daniel's safety at the school: (1) after the rumor spread through the school that Daniel was the originator of the "one down, 40,000 to go" comment, Daniel was confronted by 4 or 5 Latino students in the cafeteria, who were yelling about a racist comment and threw something at him (Defs.' 56.1 ¶ 8; Daniel Dep. at 40); (2) Daniel was scared and thought he was going to get beat up (Defs.' 56.1 ¶ 9; Daniel Dep. at 44); (3) Daniel did not resist the guidance counselor's attempt to remove Daniel from the cafeteria and Daniel was "pretty scared" at that time (Defs.' 56.1 ¶ 11; Daniel Dep. at 46); (4) while Daniel was in the nurse's office, Daniel heard people outside the office yelling that they were going to "kill" him and Daniel could see a lot of Latino students looking through a window, which made plaintiff very uncomfortable and very afraid (Defs.' *479 56.1 ¶¶ 16-17; Daniel Dep. at 53-54); (5) Daniel ran out of the school with a police officer and an Assistant Principal on each side of him (Defs.' 56.1 ¶ 18; Daniel Dep. at 57-58); and (6) as he left the school, some Latino students were still watching him at a window, and some were yelling at him in Spanish as he passed by (Defs.' 56.1 ¶ 19; Daniel Dep. at 58-59). As Daniel testified at his deposition, even after he returned home, he remained scared because of threats he had heard at the school by other students to kill him or bomb his house:

Q. Were you still frightened at that time [i.e., when he arrived home]?

A. Very. More than before.

Q. What, specifically, was frightening you at that time?

A. People saying they were going to kill me, saying they were going to bomb my house.

Q. Those were things you heard while you were in school? A. Yeah.

(Daniel Dep. at 62-63).
However, the threats did not end when Daniel left the school that day. In particular, there is undisputed evidence that the threats to Daniel and concerns about his safety continued in the days and weeks after the incident, including the following: (1) between April 26, 2004 and May 7, 2004, Daniel received a couple of threatening phone calls to his house and cell phone (Defs.' 56.1 ¶ 31; Daniel Dep. at 95-96); (2) the police stayed in the vicinity of his house for about one week after April 26, 2004 because the principal was hearing threats in the school that people were going to light Daniel's house on fire (Defs.' 56.1 ¶ 32; Daniel Dep. at 105-06). Daniel testified that his mother expressed concerns to him that someone was going to come to the house and kill Daniel. (Daniel Dep. at 77). Daniel also testified that, although he wanted to return to school in one respect, he did not want to in another respect because he was "pretty scared." (Daniel Dep. at. 75-76). In fact, Daniel did not leave his home from April 26, 2004 until May 7, 2004, when he had a meeting with Latino students. (Daniel Dep. at 95).

Based upon this record, it is undisputed that there were threats to Daniel's personal safety not only on the date of the rumored incident, but in the days and weeks that followed. Given those facts, it was reasonable for the school to conclude that Daniel's presence at the school-even if to engage in some type of speech to proclaim his innocence-posed a threat to his personal safety and the safety of other students because of the real possibility that violence could

erupt in the school due to his presence and/or speech, and no rational jury could find otherwise. Plaintiffs suggest that such fears were ill-founded because, once Daniel gave his explanation and professed his innocence to the students, the threats and safety issues would have been eliminated. That argument ignores two key problems confronted by the school. First, Daniel's mere presence at the school, even to attempt to engage in speech, could have resulted in a violent incident involving Daniel and/or others, given the volatile circumstances. Second, the school officials had no way of predicting whether the response to Daniel's speech by other students would have been positive. In other words, the school faced the reasonable possibility that other students would not have believed his proclamation of innocence and that his speech would escalate an already volatile, emotional situation at the school and result in violence to Daniel and/or others at the school.FN6

FN6. Further, with respect to any assembly and/or use of the PA system, the Superintendent was concerned that, even if the statement as written was not likely to be disruptive, once a student had access to the PA system, his message might change. (Superintendent's Dep. at 45-47 ("My experience is that you don't give the students a live microphone with the student body as the audience.... During the time that I've been there, we have not given permission for a student to address the entire school over the intercom system.").) This concern highlights the volatile and unpredictable nature of the situation that confronted the school at that time under extraordinary circumstance.

*480 To the extent that plaintiffs may suggest that the school, even if they did not allow Daniel to return to the school to engage in the speech during this period, should have distributed his written statements to all students. As a threshold matter, the Court notes that any distribution of his statement by the school under these circumstances would

constitute school-sponsored speech because, among other things, the school's involvement in any way in the distribution of this statement might reasonably have been perceived to bear the imprimatur of the school. The school's refusal to sponsor such speech is not only justifiable under Hazelwood, but also satisfies the more stringent Tinker standard for the same reasons articulated above-namely, concerns about the disruption to the school that such speech could cause, including violence or other disruptions by angry and emotional students who may not believe Daniel's statement and are outraged by his false exculpatory statement, by the school's willingness to give him a forum to make it, and by his potential return to the school. In other words, while the distribution of his speech at the school in his absence would eliminate any potential harm to Daniel at the school, it would not eliminate the potential harm and disruption to the school that could reasonably result from the response of students to his speech even in his absence.

[15] ☑ In this context, it is well settled that school officials do not have to wait for actual disruption from the speech before they act; instead, school officials have an affirmative duty to prevent the disruption to the school environment from occurring in the first place. See, e.g., Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir.2008) ("[plaintiff's] argument is misguided insofar as it implies that Tinker requires a showing of actual disruption to justify a restraint on student speech"); see also Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir.2007) ("[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989(9th Cir.2001) (" Tinker does not require school officials to wait until disruption actually occurs before they may act."). To hold otherwise would be to preclude school officials from preventing harm to students, including violence, even where the substantial disruption is reasonably foreseeable. Nothing in the First

Amendment, or the Supreme Court jurisprudence interpreting the First Amendment, requires such an absurd rule. As the Sixth Circuit has explained, if school officials had to wait for an actual disruption to satisfy the Tinker test,

school officials would be between the proverbial rock and the hard place: either they allow disruption to occur, or they are guilty of a constitutional violation. Such a rule is not required by Tinker and would be disastrous public policy: requiring school officials to wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order.

Lowery, 497 F.3d at 596; see also Melton v. Young, 465 F.2d 1332, 1335 (6th Cir.1972) ("Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished.").

*481 [16] ☑ Not only are school officials free to act before the actual disruption occurs, they are not required to predict disruption with absolute certainty to satisfy the Tinker standard. Although plaintiffs seek to second-guess with hindsight the judgment of school administrators, that is not the role of the courts. If the school's decision satisfies the constitutional standard in Tinker, then it is irrelevant that a litigant or court believes the situation could have been handled better. See Wood v. Strickland, 420 U.S. 308, 326, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) ("It is not the role of the federal courts to set aside decision of school administrators which the court may view as lacking a basis in wisdom or compassion."). As the Supreme Court has emphasized in Morse, "[s]chool principals have a difficult job, and a vitally important one." 551 U.S. at 409-10, 127 S.Ct. 2618. Moreover, "[f]orecasting disruption is unmistakably difficult to do." LaVine, 257 F.3d at 989. Thus, rather than requiring certainty of disruption, Tinker allows school officials to act and prevent the speech where they " 'might reasonably

portend disruption' from the student expression at issue." Doninger, 527 F.3d at 51 (quoting LaVine, 257 F.3d at 989); see also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 673 (7th Cir.2008) ("Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue. That could rarely be proved.... It is enough for the school to present facts which might reasonably lead school officials to forecast substantial disruption.") (quotations and citations omitted); LaVine, 257 F.3d at 990 ("[B]ecause of the special circumstances of the school environment, the level of disturbance required to justify official intervention is lower inside a public school than it is outside the school."). Moreover, in assessing the reasonableness of the decision regarding potential disruption, courts must keep in mind that school officials also are entitled to rely upon their expertise and experience in making these often difficult judgments in extraordinary circumstances. As one court has noted,

The First Amendment does not deprive school administrators of the ability to rely upon their own considerable experience, expertise, and judgment in recognizing and diffusing the potential for disruption and violence in public schools. Indeed, they are duty-bound to do just that. That duty is particularly acute when threats of physical violence have already been made and actual violence could well erupt if the hostile situation is not promptly and emphatically controlled.

Governor Wentworth Regional School Dist. v. Hendrickson, 421 F.Supp.2d 410, 423-24 (D.New Hamp.2006).

[17] ☑ The Court recognizes that the issue of reasonable foreseeability is often a fact-specific question for a jury to decide. However, where the undisputed facts demonstrate the existence of a reasonably foreseeable risk of substantial disruption, and no reasonable jury could conclude otherwise, then the school officials are entitled to summary judgment.

See, e.g., Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir.2007) (affirming summary judgment in favor of school officials because "[w]hether these aspects of reasonable foreseeability are considered issues of law or issues of fact as to which, on this record, no reasonable jury could disagree, foreseeability of both communication to school authorities, including the teacher, and the risk of substantial disruption is not only reasonable, but clear"). That is precisely the situation here. The undisputed facts-including the threats to Daniel on the day of the incident and the days following the incident-demonstrate *482 that school officials could reasonably conclude any attempt by Daniel to engage in speech at the school during this emotional and volatile time period, even if to explain his version of events with respect to the comment at issue-would "materially and substantially disrupt the work and discipline of the school." Tinker, 393 U.S. at 513, 89 S.Ct. 733. The school's concerns had absolutely nothing to do with the discomfort and unpleasantness which generally accompanies an unpopular viewpoint as described in Tinker; rather, given the escalating hostility towards Daniel at the school on April 26th and in the days that followed, as well as the high emotion over the loss of a classmate and the anger about the racially inflammatory comment that was attributed to Daniel, the school officials made the reasonable judgment that Daniel's attempted explanation could be rejected by the students and lead to a potentially disruptive and/or violent reaction that could place Daniel and/or other students and teachers in danger.FN7 See, e.g., Hendrickson, 421 F.Supp.2d at 423 ("School authorities were not required to put their heads in the sand and allow further escalation of that hostility, and concomitant disruption to the school environment, simply because [plaintiff] cloaked his [symbolic speech] in a laudable First Amendment justification."). Although plaintiffs disagree with that judgment, the undisputed facts do not provide a basis for

finding a constitutional violation of Daniel's free speech right under the First Amendment.

FN7. Although the speech at issue is different, these are the same types of safety concerns that have led several circuit courts to uphold under Tinker a school's decision to prohibit students from displaying the Confederate flag. See D.B. ex rel. Brogdon v. Lafon, 217 Fed.Appx. 518, 523 (6th Cir.2007) (upholding ban on students displaying Confederate flags because "school officials could reasonably surmise that such displays posed a substantial risk of provoking problems in the incendiary atmosphere then existing"); accord Scott v. School Bd. of Alachua County, 324 F.3d 1246, 1249 (11th Cir.2003); West v. Derby Unified School Dist., 206 F.3d 1358, 1366 (10th Cir.2000).

Finally, to the extent that plaintiffs suggest that the school's actions completely foreclosed any ability he had on his own to proclaim his innocence with respect to the comment and defuse the situation, that assertion is simply not supported by the record. First, on May 7, 2004, the principal accompanied Daniel to a meeting with 12 student leaders from the Latino community at East Hampton High School at which Daniel explained that he was not the originator of the comment and distributed a copy of the statement he wanted to read over the loudspeaker. (Daniel Dep. at 90-91). Second, the school posted the statement in the faculty lounge for faculty members to see. (Farina Dep. at 56-57.) Third, at no time did the school ever limit Daniel's speech off school grounds. In other words, Daniel was not prevented from distributing his statement outside of school grounds or otherwise communicating his position to fellow students on his own via telephone, email, or any other channel available to him. Daniel could have invited students to a location off the school's premises to make his statement. In fact, he could even have stood outside the school gates communicating his message to students as they left. Counsel for defendants, at

oral argument, noted that they never sought to foreclose any such speech outside of school by Daniel.

In sum, for the reasons discussed supra, the Court holds that the school administration's decision to deny Daniel access to the school's non-public fora to engage in speech regarding the rumored statement by him-including at a school assembly, via the public announcement system, or any other distribution system at the *483 school, or by Daniel on school grounds without assistance from the school-did not violate his First Amendment rights to free speech as a matter of law given the undisputed facts in this case.

c. Qualified Immunity

[18] [19] [20] Defendants argue that, even assuming arguendo that a First Amendment violation occurred, the individual defendants should be entitled to qualified immunity under the facts of this case. The Court agrees. It is well settled that "[t]he initial question with respect to qualified immunity is whether, viewing the facts alleged in the light most favorable to the plaintiff, there was a constitutional violation." Fierro v. City of N.Y., No. 08-3952-cv, 341 Fed.Appx. 696, 698, 2009 WL 2223067, at *1 (2d Cir.2009) (summary order) (citing Clubside, Inc. v. Valentin, 468 F.3d 144, 152 (2d Cir.2006)). "If the answer to that question is yes, then the Court must determine if that right was clearly established at the time the challenged decision was made, and whether the defendants' actions were objectively unreasonable." Fierro, 341 Fed.Appx. at 698, 2009 WL 2223067, at *1 (citing Harhay v. Town of Ellington Bd. of Educ., 323 F.3d 206, 211 (2d Cir.2003)). As the Supreme Court has explained, "[q]ualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." Brosseau v. Haugen, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). Although there is no question that the Tinker rule is

clearly established, the application of that test to the particular circumstances here leaves room for school officials, at a minimum, to reasonably disagree as to whether the return of Daniel to the school (and his proposed speech at the school) in the days following the incident would lead to substantial disruption. As one court noted,

Even if [the defendant] did violate [the plaintiff's] First Amendment right to free speech, summary judgment would still be appropriate because she is entitled to a qualified immunity defense as a matter of law. Tinker established a right for students to exercise non-disruptive expression anywhere on school grounds. At some point, however, expressive speech crosses the line into "disruptive" and thus gives way to school officials' ability to maintain order and discipline in an educational environment. The clearly established right is that students may not be punished or stopped from engaging in non-disruptive speech. Where that expression may be fairly characterized as "disruptive," however, it crosses into a constitutional gray area in which school officials are reasonable in their belief that they are acting lawfully to put a stop to the disruptive student behavior.

Acevedo v. Sklarz, 553 F.Supp.2d 164, 170 (D.Conn.2008); see also Hosty v. Carter, 412 F.3d 731, 739 (7th Cir.2005) ("Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved."); Litman v. George Mason Univ., 5 F.Supp.2d 366 (E.D.Va.1998) ("Part of the qualified immunity test is whether a reasonable person in the defendant's position would have known that his actions violated the plaintiff's First Amendment rights. Defendants in this case could reasonably have viewed [plaintiff's] actions of sending numerous e-mails and other writings to professors regarding her claims of sexual harassment as highly disruptive of the professors' work, and thus are entitled to qualified immunity....").

Accordingly, even assuming arguendo that there was a First Amendment violation as to Daniel's freedom of speech (which there was not), the individual school *484 officials are entitled to summary judgment under the doctrine of qualified immunity.FN8

FN8. Similarly, the school district and school board are entitled to summary judgment because of the absence of any evidence of a policy or custom that form the basis of liability against these municipal entities under Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In any event, as noted infra, because there is no basis for an underlying constitutional violation by the individual school officials, no claims can exist against the school district or the school board under Monell.

2. Freedom of Association Claim

Plaintiffs also contend that the school's decision to prohibit Daniel from engaging in speech at the school unlawfully infringed on his right to freedom of association protected by the First and Fourteenth Amendments. As set forth below, because this claim is entirely duplicative of the free speech claim (which the Court has concluded cannot survive summary judgment), summary judgment in defendants' favor on the freedom of association claim is also warranted.

[21] ☑[22] ☑As the Second Circuit has explained, "[t]he Supreme Court has recognized a right of association with two distinct components-an individual's right to associate with others in intimate relationships and a right to associate with others for purposes of engaging in activities traditionally protected by the First Amendment, such as speech and other expressive conduct." Adler v. Pataki, 185 F.3d 35, 42 (2d Cir.1999) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)). In the instant case, it is clear that plaintiff is attempting to assert a violation of the latter right of association-often referred to as

"expressive association." In other words, plaintiff argues that the school officials' refusal to allow the speech interfered with Daniel's right of association by prohibiting him from communicating his message to his fellow students in violation of his free speech rights. (See Plaintiff's Opposition Memorandum, at 14 ("The First Amendment protects not only a citizen's right to speak freely but also his or her right to associate freely with other speakers of similar or opposing opinions. District officials intended to interfere with Daniel's comments on a subject they wanted to erase. Attempt to silence Daniel on a subject which made the school officials uncomfortable.") (citation omitted).) FN9 Under such circumstances, the free association claim is entirely duplicative of the free speech claim. Thus, because the Court has already concluded as a matter of law that the defendants did not violate Daniel's free speech rights by refusing to allow him to communicate his message to the students regarding the rumored comment, the officials' conduct in that regard did not infringe upon any right by Daniel to associate with others for purposes of engaging in activities traditionally protected by the First Amendment. Accordingly, summary judgment on the freedom of association claim is warranted for the same reason as the free speech claim.FN10 See, e.g., *485 Illiano v. Mineola Union Free Sch. Dist., 585 F.Supp.2d 341, 355 (E.D.N.Y.2008) ("Here, the Plaintiff's freedom of association claim is duplicative of her inviable freedom of speech claim. Accordingly, defendants' motions to dismiss plaintiff's freedom of association claim under § 1983 are granted."); Birmingham v. Ogden, 70 F.Supp.2d 353, 369 (S.D.N.Y.1999) (dismissing right of association claim as duplicative of free speech claim); see also Henley v. Tullahoma City Sch. Sys., 84 Fed.Appx. 534, 544 (6th Cir.2003) ("dismissal of Plaintiffs' freedom of association claims was warranted because they were merely duplicative of their meritless retaliation claims").

FN9. The conclusory and duplicative nature of this claim is further illustrated by the fact that, in the opposition to the motion, plaintiffs brief this issue in the same section as the free speech claim and, as noted above, only briefly mention the right of association in conjunction with the free speech claim.

FN10. The Court notes that, even assuming plaintiffs were trying to assert a free association claim based upon an "intimate association" theory, such a claim also would not survive summary judgment. As a threshold matter, although the right of intimate association has been found to extend to "child rearing and education," Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987), the precise contours of that right in the school context, as it relates to the protection of relationships between parents and students or among students, are not well-defined. See Angstadt v. MiddWest School Dist., 377 F.3d 338, 343-45 (3d Cir.2004) (discussing right of association in school context); Pi Lambda Phi Fraternity, Inc., 58 F.Supp.2d 619, 623-26 (W.D.Pa.1999) (same); see also Henley v. Tullahoma City Sch. Sys., 84 Fed.Appx. 534, 543-44 (6th Cir.2003) (same). In any event, assuming arguendo that this type of claim could be asserted based upon Daniel's inability to associate with classmates, such claim could not survive summary judgment where the undisputed facts (discussed supra in connection with the free speech claim) demonstrate that the refusal to allow Daniel to return to the school to communicate his message was based upon a reasonable belief by school administrators that such speech could disrupt the school environment and pose a threat to school safety. See generally Jackson v. Franklin County Sch. Bd., 765 F.2d 535, 538 (5th Cir.1985) ("[T]he public schools unquestionably retain their authority to remove any student ... who disrupts the educational process or poses a threat to a safe school environment.").

Accordingly, the Court grants defendants' motion for summary judgment on plaintiffs' freedom of association claim.

3. Substantive Due Process Claim

Plaintiffs also assert a substantive due process claim based upon the school officials' decision to suspend Daniel, first for 5 days and then for the remainder of the school year. As set forth below, plaintiffs have failed to present evidence to create a genuine issue of material fact on the substantive due process claim; rather, the undisputed facts demonstrate that this claim fails as a matter of law.

[23] [24] [25] The Due Process Clause of the Fourteenth Amendment protects persons against deprivations of "life, liberty, or property." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment "does not provide a comprehensive scheme for determining the propriety of official conduct or render all official misconduct actionable." Pena v. DePrisco, 432 F.3d 98, 112 (2d Cir.2005). Instead, the scope of substantive due process is very limited. See Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The Supreme Court has said that it is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Substantive due process is a means of "protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Glucksberg. "In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' " Id. (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708,

140 L.Ed.2d 1043 (1998)). To satisfy this standard, a plaintiff must show that the government decision it challenges "was arbitrary or irrational or motivated by bad faith." Rosa R. v. Connelly, 889 F.2d 435, 439 (2d Cir.1989). As set forth below, the undisputed facts demonstrate that no reasonable jury could find *486 that standard to be satisfied and plaintiffs have failed to raise a genuine issue of material fact on this claim that survives summary judgment.

[26] ☑[27] ☑A school administration's decision to suspend a student will provide a basis for a substantive due process claim only in the very "rare case" when there is "no rational relationship between the punishment and the offense." Rosa R. v. Connelly, 889 F.2d 435, 439 (2d Cir.1989); see also Bd. of Educ. v. McCluskey, 458 U.S. 966, 970, 102 S.Ct. 3469, 73 L.Ed.2d 1273 (1982) (finding no due process violation where a school board's interpretation of its rules is reasonable); Wood v. Strickland, 420 U.S. 308, 326, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.") (internal citations omitted); Tun v. Whitticker, 398 F.3d 899, 904 (7th Cir.2005) (finding that a student's expulsion for "horsing around in the boys' locker room" was a "regrettable" "overreaction by the defendants, including an overly broad reading of the district's behavior code," but did not constitute

a violation of the student's substantive due process rights); Butler v. Rio Rancho Pub. Schs. Bd. of Educ., 341 F.3d 1197, 1200-01 (10th Cir.2003) ("Absent certain factors not present here, we will uphold a school's decision to suspend a student in the face of a substantive due process challenge if the decision is not arbitrary, lacking a rational basis, or shocking to the conscience of federal judges."); Seal v. Morgan, 229 F.3d 567, 575 (6th Cir.2000).

Plaintiffs have presented no evidence that the defendants' actions were arbitrary, irrational or motivated by bad faith. As discussed in detail in connection with the free speech claim, it is undisputed that there were threats to Daniel's safety on the day of the incident and in the days that followed and that there was an emotional and volatile situation at the school because of the tragic death of the Latino student and the offensive comment attributed to Daniel. Thus, the record is clear that the school first kept Daniel out of school out of concern for his safety and "[t]here is no doubt [that schools] ha [ve] a legitimate interest in providing a safe environment for students and staff." Butler, 341 F.3d at 1201. Therefore, sending Daniel home for his safety and keeping him out of the school in the days following the incident was rationally related to that legitimate interest and no reasonable jury could find that such a decision, given the undisputed facts, constituted a violation of his substantive due process rights.

Similarly, with respect to the suspension, plaintiffs do not argue that, if Daniel had made the offensive comment, that the punishment would have been unwarranted. Instead, they contend that there was an insufficient factual basis for the school to conclude that he had made the statement and cite the Commissioner's decision overturning the suspension to support that assertion. However, it is undisputed that a fellow student testified at the Superintendent's hearing that he heard Daniel make the offensive comment in question, without qualification. Thus, even though the Commissioner

eventually overturned the suspension*487 because the Superintendent failed to make individual credibility findings in his decision, the Commissioner's decision does not provide a sufficient basis for a reasonable jury to conclude that the Superintendent's determination and the decision to suspend Daniel for the remainder of the year was arbitrary, lacking a rational basis, or lacking a relationship between the punishment and the offense.

In sum, plaintiffs have presented no evidence from which a reasonable jury could find that the school administration's actions with respect to Daniel in the aftermath of the April 26th events-including his removal from the school and subsequent suspension for the school year-were arbitrary, irrational or motivated by bad faith. Accordingly, the Court grants defendants' motion for summary judgment on plaintiffs' substantive due process claims.

4. Procedural Due Process Claim

[28] [29] In order to assert a violation of procedural due process rights, a plaintiff must "first identify a property right, second show that the [government] has deprived him of that right, and third show that the deprivation was effected without due process." Local 342, Long Island Pub. Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir.1994) (citation omitted) (emphasis in original). Daniel had a constitutionally protected right to a public education. Property interests derive from state law. Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). New York's Constitution and education laws provide a right to elementary and secondary education for children up to the age of eighteen. N.Y. Const. Art. 8 § 1; N.Y. Educ. L. § 3202(1). It is undisputed that Daniel was suspended from school for a portion of the school year at issue. This constitutes a deprivation even if it were only for a relatively short period of time. See Goss v. Lopez, 419 U.S. 565, 576, 95 S.Ct. 729,

42 L.Ed.2d 725 (1975) ("Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, is not decisive of the basic right to a hearing of some kind. The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.") (internal quotations and citations omitted). Therefore, the question is whether Daniel was deprived of education without due process. See Goss, 419 U.S. at 574, 95 S.Ct. 729 (1975) ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.")

[30] "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The Supreme Court has stated that "[a]t the very minimum, ... students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." Goss, 419 U.S. at 579, 95 S.Ct. 729. Courts must weigh the various interests at issue in determining what level of process is required. Id. As the Supreme Court has stated:

The student's interest is to avoid unfair or mistaken exclusion from the educational*488 process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact

unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. "[Fairness] can rarely be obtained by secret, one-sided determination of facts decisive of rights.... Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Anti-Fascist Committee v. McGrath, supra, at 170, 171-172, 71 S.Ct. 624 (Frankfurter, J., concurring).

Goss, 419 U.S. at 579-80, 95 S.Ct. 729.

[31] ☑ In an effort to balance these interests, the Supreme Court in Goss v. Lopez set forth minimal due process requirements as it relates to suspensions of ten days or less. Specifically, the Court held that "[s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." Goss, 419 U.S. at 581, 95 S.Ct. 729.FN11 But "[a] formal *489 hearing is unnecessary" for suspensions of ten days or less. Rosenfeld v. Ketter, 820 F.2d 38, 40 (2d Cir.1987).

FN11. New York state law provides greater protection for students facing suspension of over five days. Specifically, state law provides that:
No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil and to present witnesses and other evidence on his behalf. Where a pupil has been suspended in accordance with this subdivision by a superintendent of schools, district superintendent of schools, or community superintendent, the superintendent shall personally hear and determine the proceeding or may, in his discretion, designate a hearing officer to conduct the hearing.

N.Y. C.L.S. Educ. § 3214.
Where a longer suspension is at issue, greater process may be required. See, e.g., Barnett v. Tipton County Bd. of Educ., 601 F.Supp.2d 980, 985 (W.D.Tenn.2009) ("A student's right to procedural due process requires formal procedures for student disciplinary hearings involving expulsion or suspensions of more than ten days. School officials must

tailor disciplinary hearing procedures to avoid 'unfair or mistaken findings of misconduct and arbitrary exclusions from school.' School board disciplinary hearings satisfy due process when the student is given the opportunity to refute and explain the allegations against him.") (quoting Goss, 419 U.S. at 581, 95 S.Ct. 729).

[32] ☑ In the instant case, there are no disputed facts regarding the process afforded to Daniel. Thus, the question is whether the process was sufficient to satisfy the constitutional requirements of due process. As set forth below, the Court concludes, based upon the undisputed facts, that sufficient procedure was afforded to Daniel, both in connection with the initial 5-day suspension and the subsequent suspension for the remainder of the school year, to satisfy due process.

As a threshold matter, although plaintiffs suggest that Daniel was suspended from April 27-29, 2004, there is no evidentiary basis to support that conclusion. Plaintiffs admit that there was a hostile environment toward Daniel on April 26, 2004, that "[p]eople at school made threats that they would kill plaintiff and bomb his house, making him even more frightened" (Defs' 56.1 ¶ 20), and that "Dr. Farina advised Mrs. DeFabio that Daniel was being sent home from school because there were 150 students who wanted to knock down his door and beat up Daniel" and that "it wasn't safe for Danny to come back to school and Danny should stay home a few days until the situation calmed." (Defs' 56.1 ¶¶ 21-22.) Although plaintiffs now suggest in a conclusory fashion that Daniel was being disciplined from April 27-29, 2004, they point to no evidence from which a reasonable juror could find that Dr. Farina was motivated by something other than concern for Daniel's safety or that Dr. Farina had suspended Daniel prior to April 30, 2004.FN12 In any event, even assuming arguendo that Daniel was being disciplined as of April 27, 2004, his initial suspension prior to the hearing was

still for less than ten school days (from April 27, 2004 until May 8, 2004) and, therefore, need only satisfy the standard established in Goss.

FN12. The Court also notes that the Commissioner also concluded that Daniel was not suspended when he was sent home on April 26, 2004 but rather was suspended on April 30, 2004. (See Commissioner's Decision dated August 7, 2006, at 3 ("The record before me does not indicate that D.D. was suspended at that time [i.e., April 26, 2004].").)

With respect to the initial suspension for five days, it is undisputed that plaintiffs were advised in writing of that suspension by the principal on April 30, 2004 and that the letter provided the basis for that suspension. In particular, the letter provided:

Pursuant to Education law 3214, your son, Daniel, is being suspended from East Hampton High School for five days. This suspension will begin on Monday, May 3rd and go through Friday May 8, 2004. He may return to school on Monday, May 11th. During this period of suspension, Daniel is not to be on school grounds or attend any school functions.

This action is taken as the result of our investigation into circumstances surrounding the incident on Monday, April *490 26th. It has been found that Daniel was in violation of East Hampton High School's Code of Conduct. Specifically, he is in violation of Class C behavior for making the statement "one [* * * *] down, forty thousand to go." As per our phone conversation on Monday April 26th and meeting on Thursday, April 29th, it was in the interest of Daniel's safety that he remain home pending the results of the investigation.

(Ex. M.) The letter also advised Ms. DeFabio that she had a right to an informal hearing and that a Superintendent's

hearing might be convened. (Id.) It is also undisputed that, prior to this decision, Daniel had been given an opportunity to tell his side of the story before he was sent home on April 26, 2004, and he was aware of the conduct at issue. Specifically, in the nurse's office on the day of the incident, Daniel was asked about the comment, denied being the originator, and provided his version of the events to both a guidance counselor and an Assistant Principal. (Defs.' 56.1 ¶¶ 13-15.) To the extent that plaintiffs suggest there need be some delay after suspension notice is given, the Supreme Court has explicitly rejected such a contention and noted that the student's explanation of the events often occurs within minutes of the alleged misconduct.FN13 See Goss, 419 U.S. at 582, 95 S.Ct. 729 ("[t]here need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred."); see also Rosenfeld, 820 F.2d at 40 (holding that "discussions [after the incident] afforded [plaintiff] the opportunity required by Goss to characterize his conduct"). As the Supreme Court explained in Goss:

FN13. Daniel also provided his version of the events in the letter he prepared proclaiming his innocence on April 27, 2004, which he provided to the school, discussed supra.

Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

Goss, 419 U.S. at 582-83, 95 S.Ct. 729.

In short, because it is undisputed that Daniel was given written notice of the charges against him, an explanation of the evidence against him in the written charge, and an opportunity to deny the allegation and explain his side, Goss

is satisfied and any procedural due process claim arising from the initial 5-day suspension must fail as a matter of law.FN14

FN14. The Court notes that, although not required by Goss, additional process was afforded to Daniel prior to the suspension in that, on April 28, 2004, Ms. DeFabio and Mr. Rusinksy met with Principal Farina and others to discuss the situation. The Court notes that, even under New York law, no additional process is required prior to a 5-day suspension. See, e.g., Turner v. Kowalski, 80 Misc.2d 597, 364 N.Y.S.2d 91 (N.Y.App.Div.1975) ("Since no hearing is required prior to suspension of student for period not exceeding five days, school officials are not required to advise parents of any right to an informal conference prior to suspension of student for five days or less."), modified on other grounds by 49 A.D.2d 943, 374 N.Y.S.2d 133 (1975).

With respect to the long-term suspension for the remainder of the school year, the undisputed facts again demonstrate that due process requirements were satisfied. First, plaintiffs received a letter a few days after the initial 5-day suspension notifying them that a Superintendent's hearing was to be held on Friday, May 7, 2004-the fifth day of Daniel's suspension. (Defs' 56.1 ¶ 33; DeFabio Dep. at 54.) This time frame was in compliance with *491 Goss and state law. See 2000 Op. Comm. Ed. No. 14,419 ("At end of 5th day of suspension, student must be readmitted to school unless hearing sustaining longer period of suspension was held within initial 5-day suspension period, or unless adjournment was requested by student or parent.") Moreover, it is undisputed that, on May 7, 2004, a full hearing was held before the Superintendent and, at the hearing, plaintiffs had counsel who presented their version of the facts, including Daniel's testimony, and questioned the complaining witnesses. The hearing was held on a Friday and Daniel was told to stay home from school until a decision was made by the Superintendent. (DeFabio Dep. at 71.) A decision was made

the next Monday. Specifically, the Superintendent found that Daniel was guilty of the offense and suspended him for the remainder of the school year, during which time he received home tutoring. (Id. at 72) Therefore, Daniel was given ample notice of the pending charge against him and a full opportunity to present his case at a formal hearing prior to the decision to suspend him for the remainder of the school year. Daniel was also provided with procedures to challenge that decision. In particular, after being suspended for the remainder of the school year, plaintiffs were entitled to appeal that decision. Plaintiffs, in fact, utilized that procedure. First, plaintiffs appealed the Superintendent's decision to the Board of Education of the East Hampton Union Free School District and "[b]y letter dated May 27, 2004, the superintendent notified petitioner that on May 18, 2004, respondent had reviewed the record of the superintendent's hearing and had upheld his determination and penalty." (Plaintiffs' Ex. C, at 2.) Plaintiffs then appealed to the New York State Commissioner of Education, who issued a decision on August 7, 2006, in plaintiffs' favor. Although plaintiffs also could have resorted to an Article 78 proceeding, such recourse was unnecessary because they were able to have the Commissioner overturn the suspension and have Daniel's record expunged, with all references to the situation removed from his permanent record at East Hampton. In short, because Daniel was provided with a full hearing before his long-term suspension and the ability to challenge that suspension on appeal, the Court concludes that no procedural due process claim can exist as a matter of law for the long-term suspension.

This Court's conclusion on this issue is consistent with the dismissal of procedural due process claims by other courts under analogous circumstances. See, e.g., Bogle-Assegai v. Bloomfield Bd. of Educ., 467 F.Supp.2d 236, 243 (D.Conn.2006) (granting summary judgment on due process claim based on a 180-day expulsion because "[p]laintiffs

were provided notice of the expulsion hearing, given the opportunity to be represented by counsel (which they were), and given a full-blown hearing including the presentation of opening arguments, summations, and evidence, the introduction of which was governed by the federal rules of evidence" and the opportunity to cross-examine witnesses and present their own evidence), aff'd, 312 Fed.Appx. 435 (2d Cir.2009) (summary order); Rosa R., 889 F.2d at 438-39 (affirming grant of summary judgment on due process claim based on 180-day expulsion where student and his mother received notice, were given "ample opportunity to present their views" at a hearing, and had "recourse to appeal the Board's decision to the state board of education before the allegedly unconstitutional deprivation took effect"); Cohn v. New Paltz Cent. Sch. Dist., 363 F.Supp.2d 421, 433 (N.D.N.Y.2005) (dismissing procedural due process claim on 180-day expulsion where plaintiff received notice of charges, disciplinary hearing was held, and appellate review of *492 decision was available), aff'd, 204 Fed.Appx. 56 (2d Cir.2006) (summary order).

Although plaintiffs assert several arguments to attempt to avoid summary judgment on these claims, the Court finds those arguments unpersuasive. First, plaintiffs contend that this process was not valid because the school officials allegedly had made up their mind before providing such process. However, plaintiffs provide no evidence to support this conclusory assertion of bias. Thus, the Court concludes that plaintiffs' subjective belief that the decision-makers were not sufficiently open-minded about their position is insufficient to create an issue of fact on a procedural due process claim. See, e.g., Hill v. Board of Trustees of Michigan State Univ., 182 F.Supp.2d 621 (W.D.Mich.2001) ("[Plaintiff] has failed to raise a genuine issue as to the Student Faculty Judiciary's impartiality. He has not proffered any evidence of actual bias. Therefore, in this Court's judgment, [plaintiff] has failed to raise any genuine issue of

material fact regarding his suspension after April 21, 1999."); Remer v. Burlington Area School Dist., 149 F.Supp.2d 665, (E.D.Wisc.2001) ("There is a 'strong presumption' that administrative decisionmakers are impartial. [Plaintiff] has not overcome this presumption. In fact, she has presented no evidence at all that the school board members who voted to expel her son were biased against M.R. in any way. Absent such evidence, [plaintiff] may not proceed to trial on this point."); see also McDonald ex rel. McDonald v. Sweetman, No. 02-CV-1040 (MRK), 2004 WL 717166, at *4 (D.Conn. Mar. 24, 2004) ("While [plaintiff] may rightly feel that she was tried, convicted, and sentenced by school officials who had already made up their minds, the fact remains that before she was suspended, [plaintiff] was given oral notice of the charges against her, an opportunity to prevent her version of the facts, and an explanation, however feeble, of the evidence against her. That is all the process that is required under the Constitution.")

Plaintiffs' additional argument, that the failure by defendants to fully comply with New York Education Law Section 3214 can provide a basis for a due process claim, is similarly flawed. Plaintiffs correctly note that the Commissioner, in overturning the suspensions, found that the school officials failed to fully comply with state law. Specifically, although the Commissioner found that the initial absence from school was not a suspension, the Commissioner concluded: (1) that the subsequent five-day suspension was annulled because the April 30 letter did not inform plaintiffs that they could request an opportunity to question complaining witnesses (a requirement under state law, but not under Goss); and (2) that, with respect to the long-term suspension, "the record does not contain sufficient and competent evidence that [Daniel] generated the offensive comment and thus engaged in the objectionable conduct as charged" to support that suspension. (Plaintiffs' Ex. C.) Contrary to plaintiffs' contention, however, the fact that the New York State

Commissioner of Education reversed the school's decision under state law does not indicate that there was a deprivation of due process under federal constitutional law. In other words, a failure to comply with N.Y. C.L.S. Educ. § 3214 does not necessarily constitute a violation of due process. Here, because the constitutional due process requirements were met, the failure to comply with certain provisions under state education law (that are not required by the United States Constitution) cannot give rise to a federal due process claim under Section 1983. See, e.g., Mac Ineirghe v. Bd. of Educ. of East Islip Union Free Sch. Dist., 05-cv-4324 (JFB)(AKT), 2007 WL 2445152, at *19 (E.D.N.Y.2007) ("Based on the undisputed facts, the Court finds that plaintiffs' due process rights were not violated*493 as a matter of law. Although plaintiffs were not afforded the process described under N.Y. Educ. Law § 3214, plaintiffs were afforded the process due under the Constitution."); see also Cohn, 363 F.Supp.2d at 432 (noting, in connection with New York Educational law, that "a violation of state law is not a recognizable claim under 42 U.S.C. § 1983").

Finally, to the extent plaintiffs argue that the post-deprivation procedures (although successful) violated due process because they took too long to get the suspension overturned, the Court disagrees. As one court has noted, "[i]t is well established in the context of disciplinary proceedings that post-discipline due process provides sufficient due process to satisfy the requirements of the Fourteenth Amendment." Cohn, 363 F.Supp.2d at 433; see also Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir.1984) (post-deprivation Article 78 proceeding satisfies due process); accord Gudema v. Nassau County, 163 F.3d 717, 724 (2d Cir.1998). Of course, a factor in assessing the adequacy of the post-deprivation procedures is how soon the procedures occur following the deprivation. See, e.g., Butler v. Oak Creek-Franklin School Dist., 116 F.Supp.2d 1038, 1052 (E.D.Wisc.2000) ("A third factor to consider in determining the adequacy of a post-deprivation

hearing is how soon it occurs after the deprivation."). As a threshold matter, plaintiffs received immediate post-deprivation process following the hearing and the Superintendent's decision to suspend Daniel for the remainder of the school year on May 10, 2004. In particular, plaintiffs appealed that decision to the East Hampton Board of Education and, by letter dated May 27, 2004, plaintiffs' counsel was advised that the Board had reviewed the record of the hearing and had upheld the Superintendent's determination and penalty.FN15 (See Plaintiffs' Ex. P.) In short, that appeal process took only 17 days and, thus, the defendants provided plaintiffs with a timely post-deprivation review procedure. Although plaintiffs complain about the two-year delay in the subsequent decision by the New York State Commissioner of Education, there are several problems with that argument. First, plaintiffs acknowledge that they did not appeal the Board's May 27, 2004 decision to the Commissioner until June 28, 2004 (see Compl. ¶ 88), in a time frame when the school year and suspension had come to an end, and Daniel was free to return to the school in the fall of 2005. Second, although the desire to have the suspension annulled and expunged from the record was still at issue, there is nothing in the record to suggest that plaintiffs sought expedited review with the State Commissioner or suffered any effects from the delay. Finally, there is nothing in the record to suggest that the defendants had any control as to the timing of the New York State Commissioner's decision and, thus, cannot be held accountable for any such delay. In sum, there is no evidence in the record to support plaintiffs' assertion that the post-deprivation procedures provided by the defendants were untimely; rather, the undisputed facts show that the East Hampton Board of Education's review and decision occurred in a prompt manner.

FN15. The Complaint alleges that the Board had heard the appeal on May 18, 2004. See Compl. ¶ 84.

In sum, the Court holds that the undisputed procedures afforded plaintiffs in connection with the initial and long-term suspension satisfied Daniel's due process rights under the U.S. Constitution and, accordingly, grants defendants' motion for *494 summary judgment on the procedural due process claims.

5. Equal Protection

[33] [34] The Equal Protection Clause of the Fourteenth Amendment is "essentially a direction that all persons similarly situated be treated alike." LaTrieste Rest. v. Vill. of Port Chester, 188 F.3d 65, 69 (2d Cir.1999) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). An individual not alleging invidious discrimination on the basis of membership in some group, may nevertheless prevail on an equal protection claim under the "class of one" theory recognized by the Supreme Court in Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). Under a "class of one" equal protection claim, a plaintiff must show that (1) "[he] has been intentionally treated differently from others similarly situated and" (2) "there is no rational basis for the difference in treatment." Willowbrook, 528 U.S. at 564, 120 S.Ct. 1073; see also Giordano v. City of N.Y., 274 F.3d 740, 743 (2d Cir.2001).

a. The Engquist Decision

[35] As a threshold matter, this Court concludes that the Supreme Court's decision in Engquist v. Oregon Department of Agriculture, --- U.S. ----, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) would foreclose a "class of one" claim by plaintiffs in connection with the discretionary decision by school administrators in this case as to whether Daniel should have been removed from the school and disciplined. As discussed below, although Engquist dealt with discretionary decisions in the public employment context, its analysis and rationale

clearly applies to discretionary determination by decision-makers in other contexts, such as the one in the instant case.

In Engquist, the Supreme Court addressed "class of one" claims and declined to apply this doctrine in the context of public employment. The Engquist Court reasoned that "[if] plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim." Id. at 2156. Although the Engquist decision was applied in the context of public employment, the analysis by the Supreme Court suggests that "class of one" challenges can only be made to non-discretionary decisions even in the non-employment context. For example, Engquist uses the illustration of a traffic ticket as a situation where the subjective, individualized decision does not lend itself to a class-of-one claim. See Engquist, 128 S.Ct. at 2154. Thus, although the Supreme Court noted that "[t]his principle applies most clearly in the employment context," the Court's analysis does not limit its findings to purely employment cases.

In fact, the situation in the instant case is closely analogous to the situation outlined by the Engquist Court in the traffic ticket hypothetical. In other words, the decision by defendants in this case as to which comments are so disruptive and/or inappropriate as to necessitate discipline or other action is "subjective and individualized." Id. Defendants are charged with "custodial and tutelary responsibility for children." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Decisions that defendants make on a day-to-day basis to ensure the safety and welfare of the students under their care are necessarily discretionary ones. Because defendants

acted within their discretionary powers, plaintiffs' "class of one" equal protection claim must fail. Moreover, unlike an allegation that *495 the decision was based on an impermissible classification such as race or gender, plaintiffs' "class of one" claim here does not invoke the fear of improper classification. Instead, as noted in Engquist, it simply "challenges the legitimacy of the underlying action itself"-namely, the school's decision to discipline Daniel under these circumstances. Accordingly, the analysis in Engquist appears to foreclose as a matter of law a "class of one" claim to the discretionary decisions at issue in the instant case. See, e.g., United States v. Moore, 543 F.3d 891, 901 (7th Cir.2008) (applying Engquist to challenges to decisions of prosecutorial discretion and noting "a class-of-one equal protection challenge, at least where premised solely on arbitrariness/irrationality, is just as much a 'poor fit' in the prosecutorial discretion context as in the public employment context"); Bissessur v. Ind. Univ. Bd. of Trustees, No. 1:07 civ 1290(SEB)(WTL), 2008 WL 4274451, at *9 (S.D.Ind. Sept. 10, 2008) (applying Engquist to class-of-one claim challenging the school's decision to expel plaintiff and noting "[t]he Supreme Court's rationale in Engquist effectively forecloses his claim").

However, because the Second Circuit has yet to decide the reach of Engquist outside the public employment context, this Court proceeds to analyze the merits of plaintiffs' "class of one" claim and concludes, in any event, that it cannot survive summary judgment.

b. Similarly Situated Requirement

[36] In order to prevail on a class of one claim, the plaintiff "must demonstrate that [he was] treated differently than someone who is prima facie identical in all relevant respects." Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir.2005) (quoting Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir.2002)). This requires a showing that

the level of similarity between the plaintiff and the person(s) with whom he compares himself is "extremely high"-so high (1) that "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy," and (2) that "the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake." Neilson, 409 F.3d at 104-05; Prestopnik v. Whelan, 249 Fed.Appx. 210, 213 (2d Cir.2007); see also Doninger v. Niehoff, 527 F.3d 41, 53 (2d Cir.2008) ("[A] class-of-one plaintiff must show ... an 'extremely high degree of similarity between [himself] and the persons to whom [he] compare[s] [himself]' in order to succeed on an equal protection claim.") (quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir.2006)); King v. N.Y. State Div. of Parole, 260 Fed.Appx. 375, 379-80 (2d Cir.2008) (explaining that, subsequent to Olech, the Second Circuit has "held that 'the level of similarity between [class of one] plaintiffs and the persons with whom they compare themselves must be extremely high.' ") (quoting Neilson, 409 F.3d at 104); Clubside, Inc., 468 F.3d at 159 ("We have held that class-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves. This showing is more stringent than that used at the summary judgment stage in the employment discrimination context.") (citation omitted); Pina v. Lantz, 495 F.Supp.2d 290, 304 (D.Conn.2007) ("[T]he Second Circuit has left no doubt that a [class of one] plaintiff must meet a high threshold to move beyond summary judgment. Specifically, for a plaintiff to demonstrate that he or she was treated differently from similarly situated individuals in an irrational manner, in violation of the Fourteenth Amendment, the plaintiff must demonstrate that he or *496 she is prima facie identical to the comparators.") (citation and quotation marks omitted). Further, "[g]enerally, whether two [individuals] are similarly situated is a factual issue that

should be submitted to the jury." Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 790-91 (2d Cir.2007) (noting that "rule is not absolute and a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met") (citations and quotation marks omitted); Clubside, Inc., 468 F.3d at 159 (explaining that, "[g]enerally, whether parties are similarly situated is a fact-intensive inquiry," although "a court may grant summary judgment in a defendant's favor on the basis of lack of similarity of situation ... where no reasonable jury could find that the persons to whom the plaintiff compares itself are similarly situated").

Plaintiffs point to D.A., N.C. and the allegedly unknown originator of the comment as similarly situated individuals against whom the defendants declined to take disciplinary action. Plaintiffs have failed to create a genuine issue of material fact as to whether any of these three individuals is similarly situated. As to the unidentified originator of the comment, plaintiffs have not provided the name of such individual, nor have they provided any evidence that defendants were aware of the identity of that individual. Therefore, defendants could not have disciplined the alleged originator of the comment and such individual was clearly not similarly situated to Daniel. As to N.C. and D.A., plaintiffs have put forth no evidence that anyone alleged either of those students to have been the originator of the comment. The record is clear that these students only repeated Daniel's statement, whereas there was an allegation that Daniel originated the comment, rather than merely repeating it. Therefore, plaintiffs have not put forth any evidence from which a reasonable juror could find that these students were similarly situated to Daniel. For these reasons, defendants' motion for summary judgment on plaintiffs' equal protection claim is granted.

c. Irrational and Arbitrary Basis

Assuming arguendo that plaintiff had put forth evidence that the other students were similarly situated to Daniel, the Court will analyze whether the record includes evidence from which a reasonable juror could find "that the defendant intentionally treated [Daniel] differently, with no rational basis." Prestopnik, 249 Fed.Appx. 210, 213; see also Price v. City of New York, 264 Fed.Appx. 66, 68 (2d Cir.2008) ("To prevail on a 'class of one' selective treatment claim without asserting membership in a protected class, Price must demonstrate, inter alia, that the defendants intentionally treated him differently from others similarly situated without any rational basis.") (emphasis in original); Siao-Pao v. Connolly, 564 F.Supp.2d 232, 245 (S.D.N.Y.2008) ("This Court has interpreted the Olech standard to require that differential treatment be both intentional and irrational to satisfy the class of one standard."). For the reasons set forth infra, the Court finds that plaintiffs have not raised a genuine issue of material fact as to this element either.

As discussed above, the plaintiffs have put forth no evidence that defendants were aware of the identity of the alleged originator of the comment or that there were ever any allegations that N.C. or D.A. were the originator of the comment. Therefore, there is no basis for finding that defendants acted arbitrarily and irrationally in not disciplining an individual whose identity was not known or individuals not alleged to have participated in any inappropriate conduct. Therefore, even assuming arguendo that plaintiffs' equal protection claim fell within Engquist and satisfied the similarly situated prong, this *497 Court grants defendants' motion for summary judgment on this "class of one" claim because no reasonable jury could find that the defendants treated Daniel differently, with no rational basis.

B. Ms. DeFabio and Mr. Rusinsky's Derivative Claims

[37] ☑ Defendants contend that the derivative claims asserted in this action by plaintiffs Rusinsky and Ms.

DeFabio are not available under Section 1983. Although the Second Circuit has not decided this question, the courts that have addressed it agree with defendants. See, e.g., Johnson v. City of N.Y., No. 07 Civ. 01991(PKC), 2008 WL 2971772, at *1 n. 1 (S.D.N.Y.2008) ("It is doubtful that ... a derivative claim [under Section 1983] would state a claim for relief."); Harrison v. Harlem Hosp., No. 05 Civ. 8271(WHP), 2007 WL 2822231, at *4, 2007 U.S. Dist. LEXIS 71908, at *11 (S.D.N.Y. Sept. 28, 2007) ("While the Second Circuit has not addressed whether a plaintiff may bring a loss of consortium claim pursuant to federal civil rights statutes, the weight of authority holds they may not.") (collecting cases); Kreutzberg v. County of Suffolk, No. 04-CV-3835 (JS)(WDW), 2006 WL 3370351, at *4 (E.D.N.Y. Nov. 20, 2006) ("[T]he Second Circuit has not ruled on whether a claim for loss of consortium can be brought under Section 1983; however, all four Second Circuit district courts and the Sixth Circuit have found that a loss of consortium claim is a derivative claim that is not cognizable under Section 1983.").

In any case, the Court need not resolve this issue because the derivative claims cannot stand without the underlying Section 1983 claims and the Court has granted defendants' summary judgment motion on those claims. Therefore, defendants' motion for summary judgment as to the derivative claims is also granted.

C. Municipal Liability

The Court has separately examined whether the School District or the School Board itself can be held liable for the alleged violations of the individual defendants. For the reasons set forth below, the Court concludes that summary judgment as to these entities is also warranted.

[38] ☑[39] ☑Municipalities, including school boards, cannot be held vicariously liable for the actions of an employee under § 1983. Monell v. Dep't of Soc. Servs., 436

U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("[A] municipality cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory."). Thus, "[a] municipality will not be held liable under Section 1983 unless the plaintiff can demonstrate that the allegedly unconstitutional action of an individual law enforcement official was taken pursuant to a policy or custom 'officially adopted and promulgated by that [municipality's] officers.' " Abreu v. City of N.Y., No. 04-CV-1721 (JBW), 2006 WL 401651, at *4, 2006 U.S. Dist. LEXIS 6505, at *11 (E.D.N.Y. Feb. 22, 2006) (quoting Monell, 436 U.S. at 690, 98 S.Ct. 2018) (alteration in original). "[M]unicipal liability under § 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. City of Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (quoting Pembaur v. Cincinnati, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). Thus, an individual's misconduct will not result in respondeat superior liability for his supervisors absent specific allegations that he acted pursuant to an official policy or custom. Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir.1991). However, "[a] court may draw the inference of the existence of a policy or custom 'when a *498 plaintiff presents evidence that a municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction.' " Caidor v. M & T Bank, No. 05-CV-297 (FSJ), 2006 WL 839547, at *9, 2006 U.S. Dist. LEXIS 22980, at *35-36 (N.D.N.Y. Mar. 27, 2006) (quoting Griffin-Nolan v. Providence Wash. Ins. Co., No. 04-CV-1453 (FJS), 2005 WL 1460424, at *3, 2005 U.S. Dist. LEXIS 12902, at *10 (N.D.N.Y. June 20, 2005) (quotation omitted)). But, " 'the mere assertion ... that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference.' " Zahra v. Town of

Southold, 48 F.3d 674, 685 (2d Cir.1995) (quoting Dwares v. City of N.Y., 985 F.2d 94, 100 (2d Cir.1993)).

[40] In the instant case, as the Court finds as a matter of law on summary judgment that no constitutional violation was committed against plaintiff by the individual defendants, see supra, no Monell claim can lie against the District or School Board pursuant to § 1983.FN16 See, e.g., Segal v. City of N.Y., 459 F.3d 207, 219 (2d Cir.2006) ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under Monell was entirely correct."); accord Vippolis v. Haverstraw, 768 F.2d 40, 44 (2d Cir.1985) ("A plaintiff who seeks to hold a municipality liable in damages under section 1983 must prove that the municipality was, in the language of the statute, the 'person who ... subjected, or cause[d][him] to be subjected,' to the deprivation of his constitutional rights.") (citing 42 U.S.C. § 1983); see also Ewolski v. City of Brunswick, 287 F.3d 492, 516 (6th Cir.2002) ("Having concluded that the Appellant has not shown a genuine issue of material fact as to any of the asserted constitutional claims, we therefore conclude that the district court correctly dismissed the Appellant's municipal liability claims.") Therefore, to the extent plaintiff is attempting to assert a Monell claim against the District of School Board, the Court grants defendants' motion for summary judgment as to such claim.FN17

FN16. In any event, summary judgment would also be warranted in favor of the School District and School Board because plaintiffs have failed to proffer any evidence of a policy, custom, or failure to train, that led to any alleged constitutional violation.

FN17. Likewise, with regard to the individual defendants, to the extent that they are being sued in their official capacities, the claims against them are duplicative of the Monell claim

against the School District and School Board. Tsotesi v. Bd. of Educ., 258 F.Supp.2d 336, 338 n. 10 (S.D.N.Y.2003) (citing Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)); see also Monell, 436 U.S. at 691, 98 S.Ct. 2018 (holding that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"). Therefore, the Monell claims against the individual defendants in their official capacities also do not survive summary judgment.

D. State Law Claims

[41] ☑ Having granted summary judgment dismissing plaintiffs' federal claims under Section 1983, the only remaining claims are those arising under state law, specifically, for false imprisonment, unlawful arrest, intentional infliction of emotional distress, and violation of the Mental Hygiene Law. Under 28 U.S.C. § 1367(c)(3), the Court must consider whether it should continue to exercise jurisdiction over these remaining claims. In determining whether to continue to retain jurisdiction, district courts consider factors such as judicial economy, convenience, fairness and comity. See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1191 (2d Cir.1996). Although a court possesses*499 the discretion to retain jurisdiction, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state law claims." Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir.2003) (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)); Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir.1988) ("When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims.") (quoting Mine Workers

v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

[42] Accordingly, pursuant to 28 U.S.C. § 1367(c)(3), the Court, in its discretion, declines to retain jurisdiction over the remaining state law claims given the absence of any federal claims that survive summary judgment, and dismisses such state claims without prejudice.

IV. Conclusion FN18

FN18. As the Court has granted defendants' motion for summary judgment on all federal claims for the reasons discussed herein, the Court has not addressed the additional alternative grounds argued by the defendants in their papers, such as qualified immunity on the other claims, in addition to the freedom of speech claim.

For the reasons set forth above, defendants' motion for summary judgment is granted on the Section 1983 claims. Because the Court declines to exercise supplemental jurisdiction over plaintiffs' pendent state claims, they are dismissed without prejudice. The Clerk of the Court shall enter judgment accordingly and close this case.

SO ORDERED.

658 F.Supp.2d 461, 251 Ed. Law Rep. 690

APPENDIX B

United States Court of Appeals,
Second Circuit.
Daniel DeFabio, Patricia DeFabio, Plaintiffs-Appellants,
Michael Rusinsky, Plaintiff,
v.
EAST HAMPTON UNION FREE SCHOOL DISTRICT, et. al.

Docket No. 09-4407-cv.
Argued: July 13, 2010.
Decided: Oct. 13, 2010.

*73 Raymond G. Kuntz, (Leah L. Murphy, on the brief), Kuntz, Spagnuolo & Murphy, P.C., Bedford Village, NY, appearing for Plaintiffs-Appellants.

Diane K. Farrell (Jeltje deJong, David H. Arntsen, on the brief), Devitt Spellman Barrett, LLP, Smithtown, NY, appearing for Defendants-Appellees.

*74 Present: LEVAL, B.D. PARKER, HALL, Circuit Judges.

PER CURIAM:

Plaintiffs Daniel and Patricia DeFabio appeal from a September 30, 2009, judgment of the United States District Court for the Eastern District of New York (Bianco, *J.*), granting defendants' motion for summary judgment on plaintiffs' claims brought pursuant to 42 U.S.C. § 1983 alleging violations of Daniel's rights to freedom of speech, freedom of

association, due process and equal protection under the First and Fourteenth Amendments, as well as related state law claims. We hold that in a case involving a student's assertion of a First Amendment right to return to school and make a statement disavowing a racial slur attributed to him, the school officials alleged to have violated the student's rights were entitled to qualified immunity from such claims where the record demonstrates a significant probability that the student would be assaulted were he permitted to return to school and deliver his message.

I. The Facts

Drawing all reasonable factual inferences in the light most favorable to the Appellants, as we must when reviewing a district court's grant of summary judgment, *see, e.g., D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir.1998), the events that follow took place in the spring and summer of 2004 in East Hampton, New York. On Friday, April 24, 2004, Andres Felipe Osorio-Diez, a Hispanic student at East Hampton High School, was killed in a motorcycle accident. The following Monday, April 26, 2004, was a day of mourning in the school. Remorse among Osorio-Diez's friends turned to outrage when a rumor spread through the school that Daniel DeFabio, a tenth grader at the school, had commented to a friend in reference to Osorio-Diez's ethnic background: "one down, forty thousand to go." Students were openly hostile toward Daniel throughout the day, some threatening to kill him and bomb his house. In the cafeteria during eighth period a group of four or five Hispanic students confronted Daniel and yelled that he was a racist. One of the students threw something at him. Ralph Naglieri, a

school psychiatrist, physically removed Daniel from the cafeteria after hearing from a distraught student a report of the comment attributed to Daniel and the resulting commotion. Daniel did not resist being removed from the lunch room.

Naglieri took Daniel to the nurse's office. Soon thereafter a crowd of agitated students assembled outside, yelling at Daniel and threatening to kill him. Daniel was uncomfortable and afraid. The school principal, Scott Farina, arrived in the nurse's office, asked Daniel what had transpired that day, and called the police to assist in escorting Daniel out of school. A police officer arrived in the nurse's office, Daniel put on his backpack, and, flanked by the police officer and one school administrator, Daniel ran out of the school. As Daniel departed, students yelled at him in Spanish. Farina informed Daniel's mother, Patricia DeFabio, that Daniel was being sent home for his own protection and that Daniel should stay home for a few days until the atmosphere in the school had calmed down.

The following day Daniel's mother asked Principal Farina to read over the school's public address system a letter from Daniel declaring his innocence. She requested, in the alternative, that the school permit Daniel to read the statement during a school assembly or that the school distribute the statement to the students in written form. Principal Farina denied all of these requests, citing the risk that any *75 statement could further aggravate tensions in the school. In the days following April 26, Daniel received a number of threatening phone calls at his house as well as a threatening message in Spanish on his cell phone. In light of threats heard by Farina

that students were planning to burn Daniel's house, police were assigned to patrol outside of the DeFabio household for the remainder of the week.

On April 29, 2004, Patricia DeFabio and her partner, Michael Rusinsky ("Daniel's parents"), met with Farina, assistant principal Michael Burns, and guidance counselor Caryn Lieber to discuss the events of the past days. Farina advised Daniel's parents that Daniel could not immediately return to school in light of concerns for his safety. Daniel's parents disagreed and argued strenuously that the best course of action would be to allow Daniel to return to school to "address the rumor." Farina denied their request citing the need to preserve order and calm in the school. Daniel wanted in some way to return to school, but was also "pretty scared." Daniel's parents acknowledged during this meeting that they felt intimidated in their home.

The next morning, April 30, an attorney hired by Daniel's parents contacted the school to inquire when Daniel would be readmitted to school. That afternoon Daniel received a hand-delivered letter from Principal Farina informing him that he would be suspended for five days, that Daniel was entitled to an informal hearing and that he had twenty-four hours to inform Farina if he wanted a hearing. The letter also noted that, because of the seriousness of the infraction, a Superintendent's Meeting might be held, and that if so, Daniel would receive notice from the Superintendent's office.

A week later a Superintendent's Meeting was held. Daniel attended the meeting, venturing out of his house for the first time since the day of the

incident. Two students testified against Daniel. Superintendent Raymond Gualtieri found that Daniel had made the comment alleged and suspended Daniel for the remainder of the 2003-2004 school year. Daniel received home tutoring for that time period.

Following the meeting, Principal Farina accompanied Daniel to a meeting with twelve student representatives of the Latin American community in East Hampton High School. At the meeting, Daniel told the students that he did not originate the offending statement but that he had merely repeated the comment to a friend, stating preliminarily that "you would not believe the terrible thing that I just heard someone say in the hallway." At this meeting with the twelve students, Daniel also distributed the written statement that he had earlier requested the school to read or otherwise distribute.[FN1] Most of the students told Daniel that they did not believe him. Their conclusion was informed in part by Daniel's failure to return to school following the incident-they found his absence and silence consistent with guilt. ***76** Farina informed the students that he had not allowed Daniel back in school and had denied Daniel's request to distribute his statement.

FN1. The letter stated that Daniel heard a "horrible comment ... in the hall way," and that "[i]n disbelief [he] repeated it to a friend adding 'I can't believe someone could say something that terrible.' " The letter explained that when Daniel moved to East Hampton a number of years ago as an "up island urban kid" he felt himself an outsider and therefore he could identify with "kids coming from different

countries because they too were considered different." The letter also stated that Daniel knew and liked the recently deceased student, that he mourned his loss and how sorry he was "about the ... misunderstanding about a comment I would never say." Daniel asserted that the message contained in his letter represented the substance of the message that he would have delivered to his classmates had he been permitted back into the school.

On May 18, 2004, Daniel appealed Superintendent Gualtieri's adverse decision to the Board of Education, which upheld the decision. Daniel further appealed to the New York Commissioner of Education. The Commissioner of Education annulled Daniel's suspension and overturned the Superintendent's finding. The incident was expunged from Daniel's record. The Commissioner found that the record contained insufficient evidence that Daniel had been the originator of the offending comment.

During the summer of 2004, various individuals of Hispanic background threatened Daniel at the marina where he worked. One of them attempted to get onto a boat where Daniel was working to fight him but was stopped by the first mate. On two or three occasions while Daniel was riding in a car various individuals cursed at him and threatened his life. Once while at a gas station a Hispanic individual confronted Daniel and told Daniel that he was lucky he "didn't [get] pop[ped]." In August of 2004, Daniel and his family decided that for Daniel's safety he would attend school in California the following year. Daniel never returned to East Hampton High School.

II. Procedural History

In April 2007 Daniel and Patricia DeFabio filed a 42 U.S.C. § 1983 civil rights action against East Hampton Union Free School District (the "District"), and Principal Farina, Superintendent Gualtieri, and the members of the East Hampton Union Free School District Board of Education in their individual and official capacities (the "Individual Defendants"). The complaint alleged that the District and the Individual Defendants had violated Daniel's rights to freedom of speech and freedom of association under the First Amendment, and to due process and equal protection under the Fourteenth Amendment. Appellants also asserted claims under New York state law. Following discovery, the District and the Individual Defendants (the "Defendants") moved for summary judgment. The district court granted the Defendants' motion.

The district court addressed Daniel's First Amendment claims on the merits and concluded that they were unavailing in light of controlling Supreme Court and Second Circuit precedent. The court held in the alternative that even if Daniel had shown that his free speech rights were violated, the District could not be found liable because the plaintiffs had adduced no evidence of a "policy or custom" resulting in any putative violation. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (holding that municipalities may not be held liable under 42 U.S.C. § 1983 for the constitutional torts of employees under a theory of *respondeat superior*, but may be found liable when employees act pursuant to a "policy or custom" established by the municipality). The court also held

the Individual Defendants were sheltered from liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (holding that "government officials performing discretionary functions[ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Insofar as Daniel claimed that his rights to freedom of association, equal protection and due process were violated, the district court considered the merits of these claims and *77 found them unpersuasive. Having determined that Daniel's federal claims were without merit, the court declined to exercise supplemental jurisdiction over Daniel's state law claims.

III. Daniel's Claims Against the District

To the extent Appellants maintain their claims under § 1983 asserting constitutional violations against the District on appeal, they have failed to address the district court's rationale that any alleged violation of Daniel's rights did not occur pursuant to a "policy or custom" established by the District. *Monell,* 436 U.S. at 694, 98 S.Ct. 2018. We find the district court's reasoning on this point to be persuasive. Appellants have thus waived any appeal from the district court's decision dismissing the claims against the District on that basis. *See Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir.1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Furthermore, nothing in the record suggests that the District has in place any

policy or custom that would have subverted Daniel's constitutional rights.

IV. Daniel's Claims Against the Individual Defendants

In light of the record in this case, we hold that the Individual Defendants have qualified immunity with respect to Appellants' First Amendment claims. Qualified immunity is available to the Individual Defendants with respect to the limitations on Daniel's speech and his removal from school "if either (1) their conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that [their] acts did not violate these clearly established rights." *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir.1998). Assuming *arguendo* that Daniel had a "clearly established" right under the First Amendment to return to school following April 26, or to be permitted to address his classmates on school property regarding the events of that day, although we doubt that such a right existed under the circumstances presented here, it was "objectively reasonable for [the Individual Defendants] to believe that they [were] acting within constitutional and statutory bounds," *Wilkinson v. Russell*, 182 F.3d 89, 97 (2d Cir.1999) (internal quotation marks and alterations omitted), in prohibiting Daniel's return to East Hampton High School in light of repeated and serious threats to Daniel's physical safety.

a. Student Speech

The maxim that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89

S.Ct. 733, 21 L.Ed.2d 731 (1969), is long-established and well-worn with limitations. Speech that can "reasonably be regarded as encouraging illegal drug use" may be restricted by school administrators. *Morse v. Frederick,* 551 U.S. 393, 397, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). Schools may impose sanctions upon students for vulgar and lewd speech that serves to "undermine the school's basic educational mission." *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Speech that could be perceived as affirmatively promoted by the school, as opposed to merely tolerated, may be further restricted so long as the school's limitation is "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Student speech that does not fall within any of the above exceptions remains governed by the standard announced in ***78** *Tinker*: it may be restricted if the speech will "materially and substantially disrupt the work and discipline of the school." *Tinker,* 393 U.S. at 513, 89 S.Ct. 733. To the extent that a school is in most instances a non-public forum, the school's limitations on student speech need only be "reasonable and viewpoint neutral." *Make the Rd. by Walking, Inc. v. Turner,* 378 F.3d 133, 143 (2d Cir.2004).[FN2]

FN2. Appellants assert that a limited public forum was created in East Hampton High School in the form of an assembly held in the auditorium to mourn the loss of Osorio-Diez, during which students were permitted to discuss the comment attributed to Daniel. Assuming *arguendo* that the school did create a limited public forum, Appellants have made no showing that any person wishing to speak on

behalf of Daniel during the assembly was prohibited from doing so. *See Husain v. Springer*, 494 F.3d 108, 127 (2d Cir.2007) (explaining that "once a state institution opens a limited forum to speech on a particular topic, it may not act against a speaker in that forum on the basis of views they express on that topic"). Appellants have cited no authority to support their contention that the school, by allegedly creating a single-day limited public forum for the purposes of mourning Osorio-Diez, was thereby obligated to organize a separate and distinct assembly for the defense of Daniel. Thus, even assuming that a court would ultimately conclude that Daniel had such a right, it was reasonable for Appellants to believe that their actions did not violate any of Daniel's clearly established constitutional rights.

b. Daniel's Individual Speech

With respect to the statement that Daniel wished to make on his own, without the assistance of the school, it did not involve drugs, was not lewd or vulgar, and could not have been perceived to be school-sponsored. The rule announced in *Tinker*, therefore, delineates our review of the Individual Defendants' alleged violation of Daniel's First Amendment rights. Applying *Tinker*, the relevant inquiry is whether "the record ... demonstrate[s] ... facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514, 89 S.Ct. 733.

Appellants assert that there was nothing on the face of Daniel's message which could "lead to a determination that its dissemination would risk a

material disruption at the school," and that the district court erred in focusing on "the atmosphere at school, not the speech being prohibited." Appellants' Br. at 37, 49. Appellants misread *Tinker*. The Court's focus in *Tinker* was not on the contours of the specific message the petitioners sought to convey by wearing black arm bands-the message itself was simple and self-evident: opposition to the war in Vietnam. *Tinker*, 393 U.S. at 504, 89 S.Ct. 733. The Court's focus was on the extent to which the speech would be accompanied by "disorder or disturbance on the part of the petitioners." *Id.* at 508-14, 89 S.Ct. 733. In contradistinction to the facts presented in *Tinker*, the Supreme Court cited *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir.1966), where the Fifth Circuit upheld the enforcement of a similar ban because "the students wearing freedom buttons harassed students who did not wear them and created much disturbance." *Tinker*, 393 U.S. at 505 n. 1, 89 S.Ct. 733. The Court explained that in order for a school to suppress student speech on the grounds of preventing material disruption in the school, administrators must have more than an "undifferentiated fear or apprehension of disturbance" and must be able to show that its action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 508, 509, 89 S.Ct. 733.

***79** Appellants also cite *Governor Wentworth Regional School District v. Hendrickson*, 421 F.Supp.2d 410 (D.N.H.2006) in support of their argument that the district court was required to undergo an in-depth review of the context of Daniel's speech. The court in *Hendrickson* confronted a

school's prohibition on students wearing an anti-Nazi patch and struggled with the question of "how (and where) to draw the line between a reasonable (and legally sufficient) fear of disturbance, and one that is merely 'undifferentiated.' " *Hendrickson,* 421 F.Supp.2d at 421. Here, however, we do not face any difficulty in line drawing. There is no question that Daniel's mere presence in the school, with or without his speech, would likely result in violence or the threat of violence and would therefore "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker,* 393 U.S. at 509, 89 S.Ct. 733; *see Guiles v. Marineau,* 461 F.3d 320, 326 (2d Cir.2006) (explaining that while *Tinker* was not entirely clear as to what constitutes "substantial interference," violence or the threat of violence would undoubtedly qualify). The record shows, *inter alia,* that police were assigned to protect the DeFabio home, Daniel's parents felt intimidated in their home, Daniel received death threats, and he admitted he was scared to return to school. The fact that hostility towards Daniel continued throughout the summer of 2004 also speaks to the danger that Daniel faced were he to return to school in the months following the incident.

In *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir.2008), we explained that " '[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place' " and that "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue." *Id.* at 51 (quoting *Lowery v.*

Euverard, 497 F.3d 584, 596 (6th Cir.2007) (alteration in original) and *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir.2001)). Here the school had already experienced "actual disruption," and in light of, *inter alia,* threats heard in school that students were planning to bomb Daniel's house, the Individual Defendants could also "reasonably portend disruption" were Daniel readmitted to East Hampton High School. *LaVine,* 257 F.3d at 989.

Under the circumstances, therefore, it was reasonable for the Individual Defendants "to forecast substantial disruption of or material interference with school activities," *Tinker,* 393 U.S. at 514, 89 S.Ct. 733, were Daniel permitted to return to school to speak with his classmates about his version of what transpired on April 26. Because "it was objectively reasonable [for the Individual Defendants] to believe that their acts did not violate [Daniel's] clearly established rights," they were entitled to qualified immunity with respect to Daniel's asserted right to return to school and communicate his explanation. *Young,* 160 F.3d at 903.

c. School Sponsored Speech

With respect to the school's refusal to deliver Daniel's message to the student body in his absence-either over the public address system, during an assembly or in written form-in each instance the district court found that the message could be perceived to bear the imprimatur of the school and was thus subject to the standard announced in *Hazelwood.* The court found in the alternative that the school's refusal to distribute Daniel's statement was also permissible under the more demanding

Tinker standard "for the same reasons articulated above-namely, concerns***80*** about the disruption to the school that such speech could cause, including violence or other disruptions by angry and emotional students."

Even applying the more demanding *Tinker* standard, Appellants have failed to show it was unreasonable for the Individual Defendants to have refused to publish Daniel's statement to his classmates in school. "Here, given the circumstances surrounding the [DeFabio] dispute, [Daniel's proffered statement] posed a substantial risk that [East Hampton High School] administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate ... anger or confusion over" the veracity and sincerity of Daniel's statement, as well as ancillary questions concerning the extent to which the school endorsed the statement by assisting Daniel in its publication. *Doninger,* 527 F.3d at 51-52. For these reasons, the Individual Defendants are entitled to qualified immunity with respect to this aspect of Appellants' First Amendment claim.

V. Appellants' Remaining Claims

a. Procedural Due Process

To the extent Appellants challenge the District's failure to provide an informal conference pursuant to New York Education Law § 3214(3)(b)(1) where Daniel could challenge the allegations of the complaining witness in the presence of school authorities as well as the District's alleged failure to provide him notice of the charges against him and the opportunity to explain his account of the facts, *see Goss v. Lopez,* 419 U.S. 565, 581, 95 S.Ct. 729, 42

L.Ed.2d 725 (1975), these claims are not preserved for appellate review, as Appellants raised them for the first time in their reply brief. *See, e.g., Knipe v. Skinner,* 999 F.2d 708, 711 (2d Cir.1993) ("Arguments may not be made for the first time in a reply brief."). Upon review of the record, furthermore, we have identified no "unusual circumstances" such that "manifest injustice" would result from failing to consider these claims. *Frank v. United States,* 78 F.3d 815, 833 (2d Cir.1996), *vacated on other grounds,* 521 U.S. 1114, 117 S.Ct. 2501, 138 L.Ed.2d 1007 (1997). To the contrary, the record provides abundant support for the district court's finding that "the undisputed procedures afforded [Appellants] in connection with the initial and long-term suspension satisfied Daniel's due process rights under the U.S. Constitution." [FN3] *DeFabio v. E. Hampton Union Free Sch. Dist.,* 658 F.Supp.2d 461, 493-94 (E.D.N.Y.2009). Accordingly, we find no error in the district court's grant of summary judgment for the Defendants on Appellants' procedural due process claim.

FN3. To the extent Appellants assert that the school did not afford Daniel adequate process under New York state law, the district court did not err in determining that "the failure to comply with certain provisions under state education law (that are not required by the United States Constitution) cannot give rise to a federal due process claim under section 1983." DeFabio *v. E. Hampton Union Free Sch. Dist.,* 658 F.Supp.2d 461, 492 (E.D.N.Y.2009); *see, e.g., Pollnow v. Glennon,* 757 F.2d 496, 501 (2d Cir.1985) ("Absent a violation of clearly established *constitutional* or *federal statutory rights* of which a reasonable person would have known, a school

official cannot be held accountable for damages under § 1983." (internal citation and quotation marks omitted)).

b. Substantive Due Process

(1) Appellants argue that the process that Daniel received was a pretextual farce, masking the District's true intent to subvert Daniel's First Amendment rights. Appellants argue that the district court erred by not crediting, on summary judgment, Appellants' factual assertion that Daniel was expelled from school in an effort**81* to prevent him from asserting his "constitutional right to attend school, associate with his peers and speak," Appellants' Br. at 30, in light of their showing that (i) Daniel was not disciplined immediately following the events of April 26, 2004, (ii) his parents made repeated requests that he be readmitted to the school, (iii) the length of his suspension was "excessive," (iv) he was only expelled after his attorney contacted the school regarding his readmission, and (v) the District failed to include in its code of conduct and form letter informing Daniel of his five-day suspension that he had a right to confront the complaining witness. When deciding a summary judgment motion in a civil case, all factual ambiguities must be resolved in the non-moving party's favor and the court may not weigh the evidence, but rather must only determine whether a genuine issue of fact exists for trial. *See Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 162 (2d Cir.2006).

In considering a motion for summary judgment, however, "the mere possibility that a factual dispute

may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir.1980). "To defeat summary judgment ... nonmoving parties 'must do more than simply show that there is some metaphysical doubt as to the material facts,' ... and they 'may not rely on conclusory allegations or unsubstantiated speculation.' " *Jeffreys v. City of N.Y.*, 426 F.3d 549, 554 (2d Cir.2005). (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) and *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir.2001)). "Such an issue is not created by a mere allegation in the pleadings, nor by surmise or conjecture on the part of the litigants." *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381 (2d Cir.1982) (internal citations omitted). *But see Brown v. Henderson*, 257 F.3d 246, 251 (2d Cir.2001) (explaining that summary judgment should be used sparingly when the defendant's state of mind is at issue "because of juries' special advantages over judges in this area").

Even assuming that part of the District's motivation for suspending Daniel might have been to maintain tranquility at the school, as opposed to disciplining Daniel (as the District alleges), there is no evidence from which a rational trier of fact could conclude that the school's intent was to prevent Daniel from communicating his message to his fellow classmates. The record demonstrates that the school's intent in suspending Daniel was either to discipline him, after the investigation conducted by the school showed him to be the originator of the incendiary racial slur, or to avoid the patent

likelihood of violence if Daniel returned (confirmed by numerous threats he received and the fact that he did not leave his house for almost two weeks following the incident). While it is true that the school's action prevented Daniel from communicating with the student body *in the particular manner he requested,* a jury could not reasonably find that the school's motivation in suspending Daniel was to prevent him from communicating his point of view. The school made no effort to prevent him from communicating with the student body in other fashions that were easily available to him. Accordingly, no rational trier of fact could conclude that the District's decision to expel him from school for the remainder of the school year was intended to suppress Daniel's constitutional rights rather than address legitimate education concerns.

(2) Appellants claimed below that Daniel's substantive due process ***82** rights under the Fourteenth Amendment were violated when Daniel was suspended for five days on April 30, 2004, and thereafter for the remainder of the school year. "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland,* 420 U.S. 308, 326, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). We will only find error implicating a student's substantive due process rights upon a showing that an administrator's decision to expel the student was "arbitrary or irrational or motivated by bad faith." *Rosa R. v. Connelly,* 889 F.2d 435, 439 (2d Cir.1989).

In light of the nature of the statement attributed to Daniel, the number and diverse nature of the

students affected by the statement, related concerns regarding Daniel's safety, and the Appellants' failure to adduce reasonable evidence of bad faith, the court did not err in concluding that the District's decision to expel Daniel for the remainder of the school year was not arbitrary or irrational. *See id.* at 439 (noting that "review and revision of a school suspension on substantive due process grounds would only be available in a rare case where there was no 'rational relationship between the punishment and the offense' " (quoting *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 264 (5th Cir.1985))).

c. Freedom of Association

In re-asserting their freedom of association claim before this Court, Appellants argue that the district court "granted defendants summary judgment on [Appellants'] freedom of association claim for the same [invalid] reason as the [Appellants'] free speech claims." Appellants' Br. at 55. As Appellants have identified no error in the dismissal of either the free speech claim or the free association claim, we affirm the latter ruling for the reasons explained above.

VI. Conclusion

Finding the remainder of the Appellants' arguments without merit, we affirm the judgment of the district court.

C.A.2(N.Y.),2010.
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